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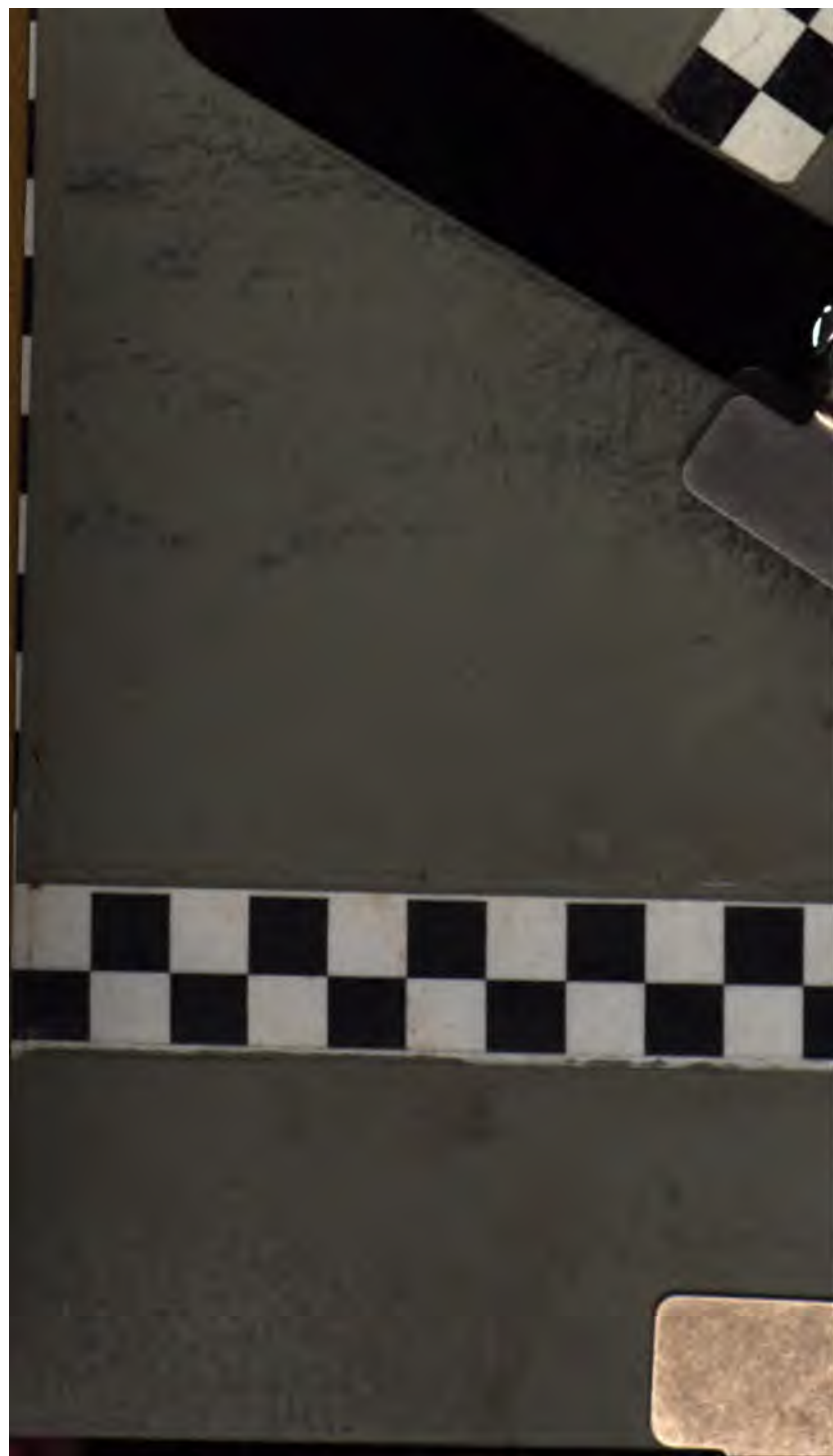
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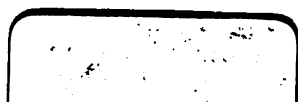




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REPORTS

OF

CASES IN LAW AND EQUITY,

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF GEORGIA,

AT MILLEDGEVILLE,

JUNE TERM, 1867, AND PART OF DECEMBER TERM, 1867.

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Hon. DAWSON A. WALKER, DALTON.

N. J. HAMMOND, *Reporter*, ATLANTA.

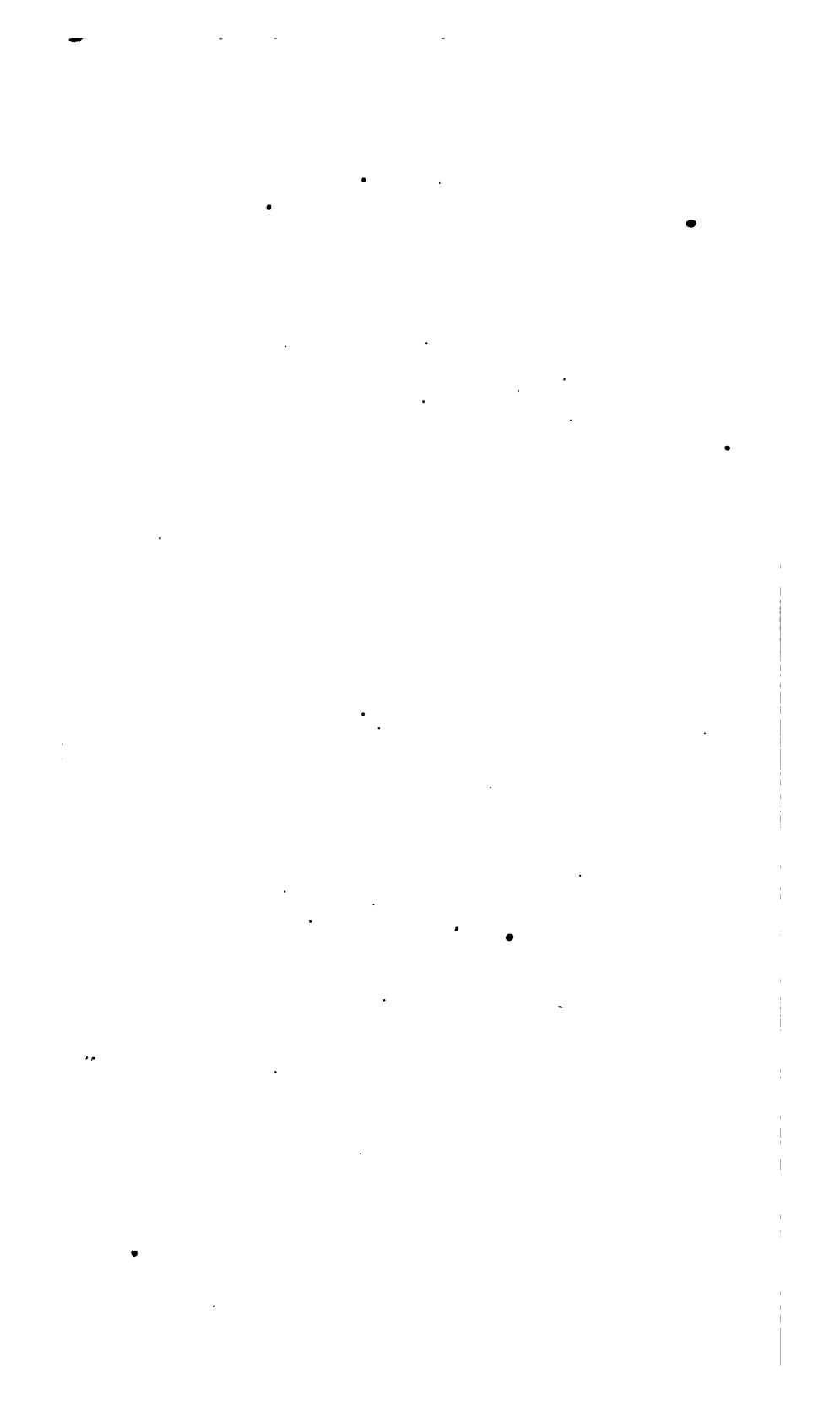
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\*Governor JENKINS filled the vacancy caused by the death of LUMPKIN, C. J., by appointing Hon. HIRAM WARNER C. J., and then filled the vacancy thus made on the bench of the Coweta Circuit, by appointing Hon. JOHN COLLIER.



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\* This case was argued before WARNER, C. J. was qualified as such.

† Sickness of a grandchild prevented Judge HARRIS from presiding in this case.

Joseph Henry Lumpkin,

THE FIRST CHIEF JUSTICE OF GEORGIA.

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DIED JUNE 4th, 1867.



## In Memoriam.

“APPEARANCE AT MILLEDGEVILLE, }  
Wednesday, 5th June, 1867. }

The Honorable The Supreme Court met pursuant to adjournment Present, their Honors Dawson A. Walker, Iverson L. Harris, Judges.

The death of the Hon. JOSEPH HENRY LUMPKIN, the Chief Justice of the Court, being announced in open court, It is ordered, as a mark of respect to the deceased, that the Court do now adjourn until 9 o'clock, to-morrow morning.”

*Extract from the Minutes.*

Immediately after the adjournment there was

### A MEETING OF THE BAR OF THE SUPREME COURT.

On motion of N. J. Hammond, Esq., Hon. Joseph E. Brown was called to the chair, and on motion of Amos T. Akerman, Charles W. DuBose was appointed Secretary.

Hon. Richard F. Lyon announced the death of the Hon. JOSEPH HENRY LUMPKIN, Chief Justice of the Supreme Court of Georgia, and moved the appointment by the Chairman, of a committee of ten to draft suitable resolutions for the occasion, with instructions to report the same to the Court during the term, in order that they might be spread upon the minutes.

The motion was adopted, and following Committee was appointed :

His Excellency Charles J. Jenkins,

Hon. E. A. Nisbet,

Hon. E. Starnes,

“ R. F. Lyon,

“ Linton Stephens,

“ Wm. Dougherty,

“ Junius Hillyer.

“ Jas. P. Simmons,

On Monday, 24th June, 1867, the Committee submitted the following

## REPORT:

The Committee appointed by a meeting of the Bar of the Supreme Court, to prepare a memorial of the late Chief Justice, submit the following report.

In the days of gloom through which our beloved State is now passing, we are called with unwonted frequency to record and to lament the death of her wisest, best and most useful sons. To that ever lengthening catalogue, we come now with heavy hearts, to add the name of JOSEPH HENRY LUMPKIN, a name to which even well-earned titles can add neither lustre nor dignity,—a name which during many years, has not failed to awaken honest pride in all true Georgian-hearts—pride still undiminished, though saddened by the consciousness that it has no longer a place on the rolls of the living.

A native of Georgia, he was educated in her seminaries, until, when far advanced in the curriculum of our University, adverse events temporarily closed its doors, and drove her youth to seek instruction abroad. Then, with honor to himself and his State, he completed his collegiate course at Nassau Hall, at a time when that venerable Institution confessedly maintained a high standard of scholarship. Returning home with the prestige of collegiate honors, he devoted to the study of the legal profession, a mind of acknowledged superiority, already trained to severe application, and quickened by an earnest and laudable ambition to do good and to acquire fame.

Arrived at manhood, and admitted to the Bar in the year 1820, he entered zealously upon the practice of his profession. But his fellow-citizens of Oglethorpe, the county of his residence, quick to discern the power he wielded and the virtue that controlled it, promptly demanded his services in the councils of the State—no slight distinction bestowed by a constituency accustomed to be served by a Crawford, a Cobb, an Upson and a Gilmer. When he entered the Legislature, that noble Roman, George M. Troup, worthy successor of Oglethorpe, grand exemplar of executive purity and ability, held the office of Governor. Accustomed to draw around him, to place in public view and to urge onward, the promising youth of the State, he placed Mr. Lumpkin on his

military staff, and thus introduced him to a brotherhood of choice spirits. Some of us, then just old enough to note intelligently passing events and prominent actors, are here to avouch their true nobility and to mingle our regrets, that all but three (Lumpkin the latest,) have followed their great chief on that dark pathway which leads through the valley of the shadow of death.

In the interval between the administration of Governor Troup and the year 1860, Georgia grew rapidly in population, in material wealth and in other recognized *indicia* of modern civilization. But in the elements of true greatness, that earlier period, the third decade of the nineteenth century, was her palmy day. Then her contributions to American statesmanship, whether employed in our national or state councils, was largest. Then was put forth her maximum of intellectual vigor in the exposition and defence of American constitutional liberty. The future historian, in writing the annals of Georgia for that time, will record, "There were giants in those days."

It was in this period that JOSEPH HENRY LUMPKIN appeared in the General Assembly of his native State. Carrying with him a reputation rarely attained so early in life, and encountering such competition as we have indicated, he passed bravely and successfully through the ordeal, winning new laurels, and gathering around him a host of friends, who, with intoxicating plaudits, cheered him on, in what they regarded a splendid political career just opening. As a parliamentary debater he evinced varied knowledge, vigorous thought, and captivating elocution, surprising, in one so young. He was fairly before the public, and all the auguries promised signal success.

His legislative career, however, was very brief—limited to two sessions of the General Assembly, those of 1824 and 1825. In this one instance, the choice of his life-long arena, he disappointed public expectation. That choice fell upon the forensic to the utter abandonment of the political; and though at intervals disturbed by pressing importunities, was never reconsidered. Forthwith, with characteristic ardor he threw himself into the practice of his profession. In explo-



ring the intricacies of law as a science, he found both mental occupation and compensating pleasure. In its practice there was connection enough with the affairs of men, and with great questions of social life,—and collision enough, of mind with mind, to satisfy the yearnings of an active spirit. As a counsellor, he was remarkable for careful examination, accurate analysis and reliable advice. In court he showed himself well fortified in the law, and fully conversant with the facts of his cases. In unfolding the former, he reasoned closely but not coldly. Without impairing the logic it demanded, his imagination constantly brought relief by garnishing its dull details. Coldness, indeed, was foreign to his nature. His impulses were quick, strong, generous. Nature wove into his temperament that nervous excitability which constitutes the subtle, controlling mesmerism of eloquence.

Combined with these traits and vastly enhancing their practical efficiency, was the purity, the virtue of his life—his unbending integrity in business affairs, which shone conspicuously wherever he lived and moved and acted. Men admired, and trusted, and sympathized with him in all things.

Grouping in the mind these qualities, physical, mental and moral, we shall be prepared to appreciate his power as an advocate—a power which impressed and moved as well the learned as the simple—a power under whose magic spell, jurors, oblivious of the stern authority of the Bench, have at times sprung from their seats electrified, and at others have uttered audible response to his stirring appeals. His practice was extensive, successful and lucrative. If he did not amass wealth, it was because he valued money chiefly for its uses, prominent among which he ranked the rites of hospitality and the *devoirs* of charity. Notwithstanding his ability and the frequent successes he achieved in the forum, he took delight in adjusting controversies and ending litigation by accord—a beautiful finish to the *tout-ensemble* of the truly great barrister.

Thus passed, after a brief dalliance with politics, (the young lawyer's artful seducer) twenty years of arduous, unremitting toil, with the too common result of failing health.

This suggested as a matter of duty, the immediate realization of a long cherished dream of foreign travel,—and abroad he went. Thus completely disenthralled of business and of care, threading the streets and art galleries of renowned cities, and roaming over historic fields and classic grounds—with his remarkable susceptibilities, physical, mental and moral, a few months sufficed to re-establish his health, and to strengthen him for the work of future years.

In the fall of the year 1845, Colonel Lumpkin returned to his native State, but not to resume, as he contemplated, the practice of his profession. Just at that time the State of Georgia had come tardily to the establishment of a Supreme Court, to the end that the law might be uniformly and correctly administered. This Court was constituted of three Judges. To Colonel Lumpkin as the fit occupant of the highest position on that bench, all eyes turned. To it he acceded without candidacy and without competition. To it he was called, not admitted. Thrice re-elected on the expiration of successive terms, he never encountered opposition—never looked in the face of a competitor. The strongest competition would but have served to develop his superior strength. In the constitution of the Court, there was made by law no titular distinctions among its members. But the incumbents were elected first for terms of six, four and two years, severally, each subsequent election to be for a term of six years. The elective Body assigned to Colonel Lumpkin the longest term, and this was the distinction conferred upon him.

His associates gracefully yielded to him the Presidency, thus confirming his claim to precedence. But whilst, in the course of time, the seats on either side of him repeatedly changed occupants, the same venerable form steadily holding the centre, came to be regarded as the impersonation of the Court. So entirely did this idea pervade the public mind that the Legislature, at length, made him by title, as he had ever been in fact, Chief Justice of the Supreme Court.

Trained in the law, of which he was a close student, by a practice extending nearly or quite through a quarter of a century, he came well prepared to the Bench. Perfectly familiar with the well settled principles of common law,

equity and criminal jurisprudence, versed in the civil law (from which so much has been borrowed in building up the other systems) and long conversant with voluminous authorities, regulating the application of those principles, under varying circumstances, he was both prompt and accurate in his judgments.

In that first, most essential requisite of judicial character, *integrity*, incorruptible, unapproachable, he was above question. With him, indeed, the love of justice was a passion. If ever he yielded reluctant obedience to law, it was when its concrete strictness restrained him in dispensing equity and justice in the abstract. Yet he was too wise, and too conscientious, ever to ignore any well defined rule of civil conduct. But why attempt to delineate a judicial character so broadly known, so generally appreciated. The records of this Court, whose reports pervade the country in its length and breadth are replete with credentials that will perpetuate his fame.

Chief Justice Lumpkin's love of law as a science had still another development. Whilst engaged in an extended and arduous practice, he usually had a class of students, and after his accession to the Bench, he was called to the law professorship in our University, which he filled with distinction to the end of his days. Many distinguished members of the profession, and many more rising young lawyers of Georgia and the adjoining States, are proud to claim him as their Gamaliel. He enjoyed, moreover, the peculiar gratification (for such it was) of having for a time, as an associate on this Bench, one of his own pupils, thus gathering in the efficient aid of this esteemed coadjutor, bread himself had cast upon the waters many years before.

In the private and social relations, where the gentler virtues and warmer affections find scope—where the guiding mind and loving heart exert control without the sanction of law, Chief Justice LUMPKIN'S position assumed the patriarchal type.

He was a husband and the father of many children. Would to God the sympathy of the brotherhood here assembled and represented could minister consolation to the survivors of that

desolated household ! With profound respect we tender the offering, and intrude no further on the sacredness of family sorrow.

Within the limits of Georgia, wherever he appeared, numerous friends rose up to welcome him. He was a man to know whom was to love him. None turned acquaintanceship to better account for mutual enjoyment or advantage. He had for all a pleasant look of recognition and a friendly greeting, and for many a needed word of counsel. Having acquired large stores of knowledge from books, and from intercourse with men, his conversation was instructive, his companionship genial. He enjoyed, and freely promoted, in social converse, that chastened mirth, which, while it lifts from the heart the burden of care, inflicts no sting, instills no poison.

The benevolence and charity of the Chief Justice were manifested as well by personal acts as in associated enterprises. His hand was in all concerted movements for the dissemination of knowledge, the improvement of public morals, or the relief of suffering poverty. Few have contributed as much of persevering effort, or of positive influence to the temperance reform, which for many years so palpably diminished the greatest moral pestilence of the age.

Thus far in an imperfect sketch of a pure and elevated character we have presented it as built up and moulded by a system of severe morality. But the most rigid and searching code of human ethics necessarily falls short of producing the highest type of man, because it is, itself, the work of man, in his fallen estate. Divinity alone can restore to him even the semblance of its own last image.

Chief Justice LUMPKIN was of a nature too earnest, too far reaching, not to bethink himself of the wonderful dispensation which brings human nature under the renewing influence of that Divinity, beginning with regeneration and effecting a change in the aspirations, the motives, the ends and aims of the subject.

To this scheme of redemption, quite above human invention, our departed Brother, in good faith and with resolute purpose, made an early surrender of himself. He became a

sincere, devoted Christian, and thus attained to the highest standard of earthly excellence. He was a pillar in that branch of the Christian Church which rejoiced in his membership. Not only was his a life of active usefulness, but from its quiet and tranquil aspects, there were daily emanations of salutary influence.

The Committee recommend the adoption of the following resolutions:

*Resolved*, That in the death of Chief Justice LUMPKIN we recognize the loss of a most worthy citizen, a Christian gentleman and an eminent jurist, whose memory and example we would perpetuate, to the end that his "good deeds may live after him," and the leaven of his life go down from generation to generation.

*Resolved*, That we respectfully tender to his bereaved widow and children the heartfelt sympathy of the Bench and Bar, and officers of the Supreme Court of Georgia, whose reverence and affection he so well deserved and so long enjoyed.

*Resolved*, That in token of these, we will, during thirty days, wear for him the usual badge of mourning.

*Resolved*, That the Clerk of this Court be requested to prepare and keep open for members of the Bar a subscription paper, that they all may have the privilege of contributing to a fund for raising over the remains of our venerated first Chief Justice an appropriate monument. And further, that the Judges of this Court be requested, through such committee or committees as they may think proper to appoint, to ask of his widow and family permission to pay this tribute to his memory, and to see that it be carried into effect.

*Resolved*, That a copy of this Report and resolutions be transmitted to Mrs. Lumpkin, for the family. That the Court be requested to have them entered on its minutes, and that the gazettes of the State be requested to publish them.

With this report the Chairman also read the following letter from Hon. John A. Campbell, formerly one of the Justices of the Supreme Court of the United States:

NEW ORLEANS, JUNE 14, 1867.

*My Dear Sir*—I have just received the melancholy intelligence of the death of Chief Justice LUMPKIN and of the proceedings of the Bar at Macon upon that event.

An intimate and affectionate connection with this great and good man, the bond of an inherited friendship, and the recollection of many expressions from him during its continuance, impel me to share with my professional brethren of my native State in expression of their sorrow, and to testify my sense of his eminent worth.

He had all the qualities to make him worthy of the station which he so long and so honorably filled. To extensive learning and a clear discrimination of the truth, he united an ardent love of justice, a hatred of iniquity, a compassionate sense of the infirmities of our humanity, an abhorrence of oppression, and a rational detestation of the oppressor. These qualified him to administer justice between man and man, and to form the jurisprudence of a State.

He had no ambition above and beyond his place. He was content with the profession of virtue and with that independence which enabled him to perform his duty without fear and without partiality.

In the walk of life he recognized the presence, or rather the omnipresence of law, in domestic and social life the law of Charity; in the Church, of Hope and Faith; in the State and its tribunals of justice, his life was the manifestation of these.

In this period of the general relaxation of these laws, the loss of this great exemplar and exponent of them is a public calamity.

Very respectfully yours,

JOHN A. CAMPBELL,

COL. WASHINGTON POE, *Macon, Georgia.*

Response of Judge Iverson L. Harris to the report and resolutions:

*Mr. Chairman and Gentlemen of the Bar*:—The relation in which I have stood for more than twenty-five years to the late Chief Justice of this Court, demands of me on this mournful occasion something more than a formal assent to the

chaste and beautiful tribute which you have just rendered to his memory.

I owed him living a deep, deep debt of gratitude, and whilst I shall ever cherish in remembrance that in an hour of the deepest affliction which it has been my lot to feel, I was sustained by the counsel, sympathy and friendship of himself and two other distinguished members of our fraternity who have preceded him to the tomb, I beg you to believe that this response is the dictate of an earnest desire to assist the people of Georgia to form a correct estimate of the intellectual characteristics of this remarkable man and of what he has accomplished, rather than to make a record of my personal regard.

I will not speak of him as the pious, Christian gentleman, the husband, father, friend, the patriot, the philanthropist, the zealous advocate of temperance and of education. In each and all of these relations and characters he was well known and appreciated. The beauty of his private and inner life has been so well depicted by you and other eulogists, that I dare not attempt to add to the testimonials which have clustered over his memory.

It is as to his ministry in the temple of justice I would speak; of him as the unequalled advocate—the great Judge.

Whilst in doing so I am conscious that I will have to occupy to some extent the ground covered by your report—a necessity which I would gladly avoid constrains me, in order to give completeness to the picture of him existing in my mind.

Graduating in 1820 with one of the highest honors of Nassau Hall—the favorite resort of Southern students—that college which had been presided over by the celebrated Jonathan Edwards, the grandfather of Aaron Burr, and at a later period by Witherspoon, Smith and Alexander—that college which gave to the service of the United States Forsythe and Troup, Gaston and Berrien, and Seaborn Jones, and hundreds of others, children of fame—he came back to his native State and began the study of law in Lexington, under the late Judge Thomas W. Cobb.

At and near this village then resided the illustrious Wm.

H. Crawford, Stephen Upson, Governor George R. Gilmer, Joseph Molloy, and other lawyers of distinction.

'Twas among these gentlemen he prosecuted his legal studies, securing their friendship and encouraged by their praise.

Very early after admission to the Bar he commanded notice. He was elected a representative to the Legislatures of 1824 and 1825, from the county of Oglethorpe.

In 1825 he presented resolutions of an enthusiastic character in response to the celebrated declaration of Governor Troup—that "having exhausted the argument we will stand by our arms."

They however were not acted on.

During the same session of the Legislature he made much reputation by a highly finished speech in opposition to a bill pending to lay off the State into Congressional Districts.

I stood in the gallery, and never but on two other occasions, though frequenting the debates of the Legislature and of Conventions from early boyhood, witnessed such breathless attention, such unequivocal admiration. At this remote period I recall the scene in all its freshness. I hear yet that rich-toned voice. It vibrates now as then on my ear. I look upon his fine face, varying with deep emotion, his graceful, expressive attitude. Can this be an illusion? Could anything but extraordinary eloquence thus photograph itself on the memory?

Retiring after a debut of such promise from the halls of legislation, he engaged with the ardour and emulation of his excitable temperament in the practice of law, and in a few years he became and was recognized as the most eloquent advocate of the Northern Circuit, a circuit abounding at that time and since in lawyers of eminence.

After a lapse of nearly fifteen years since he withdrew from politics, he was called, in the discharge of professional duty, to Milledgeville, the Legislature being in session when an opportunity was furnished him for the exhibition of the wonderful powers of persuasion and pathos for which he was so renowned.

The impression of this effort was profound, and contributed



to extend his reputation as a lawyer and advocate throughout the whole State. His name now was on every lip. The young and old alike did homage to the orator who stood unapproached, above all others.

When the Supreme Court for the correction of errors of law in the Superior Court was established, (after a long and hard conflict with the prejudices of ignorance and parsimonious legislation, but with the still more powerful influence of many of the most distinguished and leading lawyers of the State, who saw in its creation the doom of their circuit power and diminution of their income,) the public wish of the dominant party in the Legislature was particularly pointed to two gentlemen as the persons under whose auspices the new Court should be organized, and whose undoubted eminence would inspire confidence in it with the people.

It so happened that the person to whom all eyes were first directed, for many years a Judge of the Superior Court of the Eastern Circuit, the acknowledged head of the Bar of Georgia, at one time the Attorney General of the United States under General Jackson's administration, a gentleman who before the Supreme Court of the United States had mingled in debate with Webster and Wirt, Taney and Tazewell, and the equal of any man at that bar, was prevented solely by the immense physical labor imposed by the act originally creating the Court, from accepting the station to which he was invited.

Judge Berrien having declined, the members of the Legislature of 1845, with singular unanimity, elected JOSEPH HENRY LUMPKIN to the long term which was virtually the headship of that Court. He was no candidate; he was not even in Milledgeville nor had he been here. The officesought him, the State claimed his services, and he abandoned a most lucrative practice to obey her will.

At this period there were ten judicial circuits. Each judge of the Superior Courts was supreme in his district, the final arbiter of life and death, with almost unlimited civil and criminal powers—with no existing tribunal appellate or revisory over his judgment, however erroneous or discordant.

It is difficult at this day to realize the existence of such a

judicial *Decemviri*, with such unchecked power, far transcending that of the Roman, and that verdicts were in some circuits wrung by the eloquence and popularity of bold, influential and arrogant lawyers from juries, contrary to law and right, and that they were *final*. 'Tis true that the Circuit Judge could and should have granted a new trial, so as to have corrected such gross injustice, but oftentimes he was but a slave to the same power.

Thus the administration of law was not only far from being uniform, but it was a mere chance as uncertain as the hazard of the die.

The establishment of a tribunal of review became a necessity, and if it accomplished nothing more than the emancipation of judges and juries from this degrading and pernicious mental slavery, it would well have repaid the expense incurred in the experiment.

Indeed, every consideration of justice and public policy united in requiring that able counsel who had obtained unrighteous verdicts, should be stripped of all the advantages which they had acquired.

It was moreover matter of great importance in the administration of law that the young barrister should be elevated to his proper level, so that his industry, integrity and reasoning faculties might be estimated at their true value.

A great reform has occurred since 1845. Under the administration of Judge LUMPKIN, aided by eminent associates, a new system exists, or rather the judicial system of 1799, so simple and complete in outline has been greatly evolved, and if not yet entirely developed, has been made harmonious and efficient.

To the Georgia jurist, the change in the administration of law since 1845, up to 1867, cannot but furnish a subject for profound contemplation.

It is undeniably true that previous to 1845 some young and ardent reformers in the Legislature had shown that they belonged to the advancing age, by the struggles they made to shake off the tight-laced jackets of the common law, and the Chinese shoes which retarded movement and were unsuited to growth.

Change was wanting and had begun. The stream of progress which diffused and increasing intelligence alone can quicken into motion, was moving everywhere and in all the departments of human activity.

It was no mountain torrent owing its birth to some sudden storm or to dissolving masses of snow, soon to pass away, but it was a perennial stream, increasing in breadth and depth as it flowed on and continues to flow "*volubilis in omni ævo*."

Judge LUMPKIN had the sagacity to distinguish between them, and with the enthusiasm of his temperament and comprehensiveness of mind, he threw himself boldly into the strong current and to the end of his life evinced neither exhaustion nor pause.

I have long entertained the idea that every true reformer must, in a great degree, imitate the example of the celebrated Russian Field-marshal, who slept on the field he had won, amidst the entrenchments he had stormed,—who led his columns from province to province, from victory to victory, by one word of command, "Forward!"—but oh, how expressive! For him there was no rest as long as there was anything to do;—no Campanian plains abounding in enervating luxuries could stay his march, or allure him from the conquests he meditated.

Judge LUMPKIN exhibited a like spirit, a like indomitable perseverance in his steady approach to the judicial reforms he contemplated. The consciousness of the good to be accomplished, cheered and compensated him.

He lived to see the wise and beneficent principles into which he had expanded the germs of a crude, disjointed, technical and incongruous Jurisprudence, embodied and bound up in terse yet perspicuous definition, furnishing rules of uniform and essential service, by which the controversies of men could be adjusted—in that masterly portion of our Code which is generally understood to have been the work of his beloved son-in-law, the late General Thomas R. R. Cobb, the ardent and enthusiastic child of genius, the christian patriot and great lawyer.

It was the good fortune of Judge LUMPKIN to give vitality to the system delineated by the act of 1799, and through the

short, perspicuous forms devoid of technicalities authorized by it, to infuse into the administration of the principles of the Common law much, very much of the liberal views taken by Courts of Equity—and thus enabled the former to give adequate relief in most cases.

A reform like this, not violating law but returning to it—has encountered resistance, and will continue to feel the hostility of that class opposed to change in anything, however necessary or demanded by advancing intelligence.

The apprehension that any system of Jurisprudence can be suddenly and fundamentally changed, is needless. A correlative force is ever at work to check excess. When change takes place, it will be the result of some great minds of the profession itself—of men whose intellects have been outraged by the absurdities and injustice which are occasioned by common sense being made subordinate to some silly precedent,—or to the crude and quaint notions of a remote, bigoted and intolerant age, being adhered to as *criteria* of right and justice.

Looking back over the gradual development of our system, the jurist of the present day will most probably deem it fortunate that the tribunal through which this has been chiefly effected, was organized under the auspices of a fresh mind, full of knowledge, enthusiastic, and in the vigor of manhood,—of one who had early imbibed much of the skeptical spirit of Bentham as displayed in his treatise on the Rationale of Judicial Evidence.

I am inclined to think, had Judge LUMPKIN been older when called to the Bench—had he become the head of a school—withdrawn from the contests of the Bar—with reputation established by previous judicial service—when technical learning was cultivated assiduously, and technical justice rigorously enforced,—admired, caressed and imitated—his opinions received as oracles,—it is questionable whether the change of which we are so sensible, would have occurred. Men of the class referred to, repose in their early habits and creeds; they do not re-examine the foundations of their early opinions, nor are they patient when these opinions are doubted or questioned. So long as this class continue to

control or even influence the thoughts of others, little that looks to change or advancement can be expected from it. Old lawyers like old warriors, adhere with tenacity to the routine of the old systems in which they were educated, and which have been the occupation of their manhood.

#### AS THE ADVOCATE.

In early manhood he was distinguished by manly beauty, The contour of the face was highly intellectual—the forehead high, broad and fully exposed. He had dark grey eyes, restless and constantly varying in expression, and a quivering lip. A physiognomist would have delighted to meet with such a subject, in whom the ideal of the *personnel* of the orator would be so nearly realized.

His voice was clear and melodious—a rich baritone—obedient to his will and modulated with consummate art, so that it continued to charm by its cadence as long as he spoke, and at no time exhibited strain or inequality. This control over it was doubtless owing very much to the distinctness of his articulation of each syllable of a word,—and marked emphasis.

He used little gesture, but it was graceful and expressive; his attitude was adapted with care to the theme and occasion. Add to these personal, and I might with propriety call them external, qualifications, his large encyclopedic knowledge, gathered from libraries of law and literature, and we can begin to make some estimate of the resources with which his oratory was supplied.

Indeed it may be said without exaggeration, that learning waited on him as a hand-maid, presenting at all times for his choice and use, all that antiquity had not lost—all that a prolific press has disseminated.

With a vivid imagination quick to body forth the creations of the mind, his speeches at the bar abounded in imagery; but it was not sought for or culled from a commonplace book to dazzle or adorn. It sprung up spontaneously from the exuberance of a mind heated with thought; his tropes were the corruscations of the glowing axle in rapid motion, shedding a brilliant light over the pathway of reason.

It was a remarkable characteristic of his oratory, that his imagery was not drawn from a converse with nature.

He had not frequented mountain scenery with its colossal piles of rocks, irregularly heaved high by some convulsive force; he had not gazed o'er the valleys stretching far away to a distant mountain chain, with scarce a gorge through which the fiery locomotive could be seen dashing along with the freights of labor, carrying sustenance and life to lands parched with skies of brass; nor had he whiled away any hours of relaxation in contemplation on the sea-shore, looking in awe on the broad and uncontrollable power before him—the highway of nations and the home of the tempest, the water-spout and cyclone, the terrific children of the sun and sea. 'Twas not from a memory filled with these grand phases of nature and her forces, that he collected his figures. He was emphatically a man of the closet and library.

His imagery was drawn from the remembered bright and golden thoughts of Shakspeare and Milton, from the sacred poetry of Job and David, the wisdom of Solomon and of the son of Sirach, and from the prophetic inspirations of Ezekiel and Isaiah—in a word, from the whole Bible. Most aptly were his illustrations culled from such a garner, and woven into the fabric of his speeches.

It required a person of his precise mental constitution, of unaffected and humble piety and cultivated taste, to employ this high poetic thought and wisdom without irreverence; and this was done with such marvelous skill that even hyper-criticism did not venture to condemn.

This style was peculiarly his own. It is a dangerous one to attempt. It may not be ventured upon except by a man of unquestionable genius, vast knowledge, exalted piety, enthusiastic temperament and exquisite taste.

I have spoken of the personal qualifications and mental resources which united to make him the orator he was, the great master of pathos and persuasion.

A reputation so wide, so high—a career so dazzling—without a compeer—has not been effaced by his long judicial service; so far from it, the reputation of the Advocate has been and still is the chief drawback upon the just fame he is

entitled to as a Judge. There is a common reluctance, I am pained to say, which the world hourly exhibits, of according to any man, whatever versatility of talent he may have displayed in other departments—a double distinction.

It is a matter of gratulation to the friends who survive and honor him, that whilst little remains—indeed nothing at all—that can recall his eloquence at the bar in defense of persons accused of crime—an eloquence which defied the power of stenography to embalm or preserve, or to catch the *epæa pteroeuta* so volatile that they were exhaled as uttered—there is much left of the power and comprehensiveness of his mind beyond the reach of time and decay, and which does not rest in memory or tradition.

As the Chief Justice of the highest tribunal of the State, there are many memorials of his learning and eminence, which are secure. In the thirty-five volumes of Georgia Reports are to be found all the written opinions of Judge LUMPKIN. One third of all the opinions belong exclusively to him.

What constitutional or legal question which he has discussed, that he has not illustrated from a full mind?

Its exuberance was amazing, resembling strikingly the Nile in its annual overflows, charged with the fertilizing matter it had collected from hundreds of sources, and depositing them as it passed through the desert, on its barren sands, with careless profusion on the right and left, enriching and giving life and abundance throughout its course.

This very abundance has subjected his printed decisions often to criticism neither tolerant nor appreciative, nor even apologetic. Ignorance commonly sneers at what is beyond its reach or comprehension, and complacently concludes that nothing is valuable in knowledge beyond its own limited acquisitions—nothing pertinent to a subject, which is not included within the horizon of its view. To its measure and standard it seeks ever to subject men of a different class,—those whose sphere is the lofty empyrean where eagles *only* soar.

Let the bat wing his flight in the dim twilight in search of moths and its insect food—he is doubtless a useful creature

in his place in creation ; but it is a reproach to a highminded and generous profession, to permit one who soared aloft to catch the earliest rays of the sun in his coming, and its light and heat high in the heavens, to be hawked at by mousing owls and dragged down to the level of inferior natures, who would strip him of his plumage and fix him to the earth.

Judge LUMPKIN's opinions were written out hastily, often a most irksome task, and when the impressions of the argument had faded from the memory, and almost always without revision. Certainly without revision they were committed to the press, and whilst they embodied the points discussed and the legal principles by which the adjudications were made,—many, very many of them are very unlike the oral opinions delivered in the same cases. They are as unlike in animation and glow and freshness, as the dead corpse is to the living, healthy, muscular man.

It has often occurred to me that it was a great misfortune that the Court had not had connected with it an expert stenographer, so as to have taken down his decisions as delivered, that they, after having undergone his revision, might have been preserved to us.

He was, in the preparation of his written opinions, more neglectful than any man I have ever known, of his fame. In this habit unknown to the profession generally—known only to a few intimate friends, will be found the cause why some of those opinions have been subjected to a harsh criticism for matter incorporated and deemed too episodic.

It would have seemed, had not the fact been otherwise, that generous natures partaking something of his genius, and who had traversed the same fields of thought, would have characterized whatever blemishes of style or taste, or peculiarities of expression they might have detected in these opinions, as “the overflowings of a mind, the richness of whose wit was for the time unchecked by its wisdom.” This was the apology of Pitt for Burke ;—it was the apology of an opponent alike the scholar and gentleman.

I have spoken of the large knowledge which as a life-long student he had acquired, yet I must not omit to mention the marvellous quickness of perception with which he was en-



dowed, and which could not have escaped the notice of even the casual practitioner in this Court.

Upon the bare statement of the facts of a case, without argument or authority, he intuitively grasped it in its whole extent and without apparent effort with facility resolved a complex mass often obscure, into a few simple propositions.

Marked as was this faculty, he excited most admiration when fresh from the conference room, where the principles controlling a case after having been carefully reasoned upon, enlarged, modified or explained, had been agreed on, it was his province to enunciate the judgment of the Court.

The facts in the record had been by him thoroughly winnowed, each one forming an element of the judgment had been carefully examined, its value ascertained, they were collected into a compact mass, bound together by cords of illustration, and then were presented so lucidly that the Bar in advance could always anticipate the legal principles which would be applied, which such a statement logically coerced.

The process by which his conclusions were reached, was not tediously, step by step, unfolded with every intermediate proposition, forming a link in the chain of ratiocination distinctly stated; his vigorous logic leaped along from one important position to another until the goal was attained, leaving slower minds to supply what consciousness in its power either disdained or intentionally omitted.

Perhaps no judge was more painfully conscious than he was of the immense astuteness displayed by the Bench and Bar everywhere in the exclusion of testimony, instead of using the obvious and natural means of arriving at truth.

It would seem to be a correct general proposition, if every treatise on evidence did not evince the contrary, that no species of evidence which can enable the mind to re-construct or reproduce a transaction in all its details as it occurred, or which could throw light upon it, should be rejected.

How often have technical rules of evidence frustrated the substantive provisions and ends of law, and made the *ultimate* decisions in cases to depend on the accessory and adjective means adopted to arrive at a proper end, rather than the end itself,

which was the administration of that which was just and right.

Nor are many of these rules the creatures of legislative will, prescribed law demanding a strict compliance with them ; they are rules made by the judges themselves as aids or means to facilitate the investigation of truth.

So unfixed are some of these rules, so broken down by exceptions, their obligatory force has been so much impaired by the contrariety of opinions existing with judges in their application, that it would seem to be a necessity, aye more, a high duty in Courts at this day to adopt broader rules for the admission of testimony, repudiating all objections to the competency of witnesses, and letting them go upon their credibility. This course appears to be in accordance with principle and the analogies of law.

And so thought Judge LUMPKIN. In relaxing the bands which fettered truth and endeavoring to adjudicate each case upon its own intrinsic merits, not much regardful of mere technical rule, he became thereby and will be hailed at a future day as a great public benefactor.

Of Judge LUMPKIN it may be said truly, as it has been said by Mr. Welsby, in his life of Lord Mansfield: "It is certain that he was most anxious to decide every cause on its merits, rather than on a mere matter of form ; it was his disposition to slight or overrule judgments which had been founded on principles obviously no longer applicable to the state of affairs and of society ; in short, it was his constant wish to administer justice as well as law (they are not always synonymous)."

In fine, he closed his brilliant and useful life near the period allotted to man on earth. It was in every way a fitting moment. It was sudden ; fortunately for him and for those who loved and honored him, he was not doomed to linger out a few years more in helpless paralysis.

His faculties shone out to the last, not in their meridian splendor, yet (for the last year when in feeble health) with the milder and mellow light of a setting sun on a fine autumnal evening, leaving behind him the skies lit up with his descending glory.

Your committee propose to erect a monument to his memory. It would be a fitting tribute to exalted worth. The best end probably which such a structure can accomplish will be the inspiration of the young Georgian who gazed on its inscriptions, to tread with emulation the paths which ensured such distinction.

We are told that the trophy erected on the field of Marathon in honor of Miltiades would not permit the young Themistocles to sleep.

More lasting than the marble from which time will efface the record of the virtues and talents inscribed by affection and admiration will be the enduring monument which he himself erected.

Wherever the Georgia Reports may be found there is his monument. As long as Georgia exists, as long as any vestige of law or equity remains to govern or to be applied in the transactions of daily life, indeed until a long night of barbarism shall ensue in which the past will be obliterated by the fanaticism of ignorance and hate, the principles of law so luminously expounded by him in his long judicial service will be hourly appealed to in the settlement of the controversies of future generations.

In the evolution of society which must ensue in a more advanced civilization, it cannot be doubted that before the then existing tribunals of jurisprudence, the name of Chief Justice LUMPKIN will be uttered with veneration, and his opinions cited as those of the upright Judge who loved truth and justice and right for their own intrinsic excellence.

May we not be assured that in the love and admiration of the young who are to succeed us in ministering in this Temple, in the order of every votary to the science of Law, there will be a perpetual guard of honor to watch over his fame. It cannot but live should no shaft or pyramid inscribed with his name arise towards the skies, and some stranger wandering through the land, not unfamiliar with his eminence, ask "where is his monument," let the sons of our soil proudly bid him "look around."

## RESPONSE OF CHIEF JUSTICE WARNER.

The report of the Committee, which has just been read, makes the formal announcement to this Court of the death of Chief Justice LUMPKIN.

The loss of such a man, at any time, would be a great public calamity, more especially is it so at the present time, when the troubled condition of our country imperatively demands the counsel, wisdom and genius of our best and most experienced men.

No man better understood the wants and material interests of the people of his native State than our lamented brother. None was more devoted to their permanent welfare and prosperity.

Associated with him upon this bench for eight years, in the discharge of the respective duties incident to the organization of the Court, I can bear testimony that, at all times and upon all occasions, he laboriously and faithfully performed his whole duty. His high intellectual attainments, his great professional learning, his strong sense of justice, his polished manners, added to his great moral worth and Christian charity, deeply impressed those of us who have been the witnesses and companions of his judicial labors, with the irreparable loss which this Court and the Bar have sustained in his death.

Let us endeavor to emulate his manly conduct, his judicial integrity, his high moral standard and Christian charity, and when the dread summons shall come, be prepared to follow him into the mansions of eternal rest.

Heartily concurring in the eloquent tribute of affectionate respect to his memory expressed in the resolutions, let them be entered on the minutes of the Court as a perpetual memorial of the high estimation in which he was held by his professional brethren when living, and of their deep, heartfelt, mournful sorrow at his death.

“The committee appointed at a meeting of the bar of this Court having made, through their chairman, His Excellency, Charles J. Jenkins, their report on the death of the Hon. JOSEPH HENRY LUMPKIN, late Chief Justice of this Court,

"It is ordered by the Court that said report be entered on the minutes, and that the Clerk of this Court do transmit a copy thereof to Mrs. Lumpkin for the family of the deceased."

EXTRACT FROM THE MINUTES.

The following members of the bar were appointed as the "Monument Committee":

HON. E. STARNES,	W. G. MCKINLEY,
J. R. PARROTT,	GEO. N. LESTER,
HUGH BUCHANAN,	L. E. BLECKLEY,
JUNIOUS HILLYER,	H. K. MCCAY,
J. L. WIMBERLY,	HON. R. F. LYON,
CINCINNATUS PEEPLES,	GEN. HENRY L. BENNING,
	GEN. JOHN B. GORDON.





# CASES

ARGUED AND DETERMINED

IN THE

Supreme Court of the State of Georgia,

AT MILLEDGEVILLE,

JUNE TERM, 1867.

Present—HIRAM WARNER, *Chief Justice*.  
IVERSON L. HARRIS, } *Judges*.  
DAWSON A. WALKER, }

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LEONARD WORTHY, plaintiff in error, *vs.* MARY A. WORTHY,  
by her *prochein ami*, NATHAN RESPASS, defendant in error.

NOTE.—WARNER, C. J., did not preside in this case.

A suit for a total divorce, brought in the name of a lunatic wife, by *prochein ami*, against her husband, cannot be maintained. The right to institute such suit is strictly personal. It is at the volition of the wife only, whether such suit shall be begun and prosecuted or not.

The will of a *prochein ami* or guardian of a confirmed lunatic may not be the will of the lunatic. Courts will regard only the *intelligent will* of the *lunatic*.

Divorce. Demurrer. Decided by Judge COLE. From Crawford Superior Court. Chambers, May, 1866.

This case was argued December Term, 1866, and held up. Mary A. Worthy, (sueing by her next friend and father, Nathan Respasse,) in her libel, alleged, that she married defendant in 1858, lived with him till about the first of Novem-



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Worthy *vs.* Worthy.

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ber, 1865, when she became insane, and was by him sent to the Lunatic Asylum, where she then was, and that he was guilty of adultery with persons therein named, with the other usual allegations in such cases, and a schedule of property, verified by said next friend.

The defendant, by his solicitors, filed a general demurrer. By consent it was argued in Chambers.

The Court overruled the demurrer, and ordered defendant to answer. This action of the Court is assigned as error.

ROBERT P. TRIPPE, P. W. ALEXANDER and JAMES W. GREEN, solicitors for plaintiff in error.

JAMES M. SMITH, for defendant in error.

HARRIS J.

This is a suit instituted by the father of a female lunatic as her next friend, against the defendant, her husband, for a total divorce, on the ground of adultery, and the question is, whether a guardian or next friend can, of his own will, institute such a suit, and prosecute or abandon it at his pleasure?

Mrs. Worthy was at the institution of this suit a lunatic, and confined in the asylum near Milledgeville.

It does not appear that, after her affliction, at any time, she had a lucid interval; for if she had, and that being shown, and that during that interval she had directed suit for divorce to be brought, it should have been in her own name, without appearance by next friend. This suit is an indirect admission that she had no lucid interval, and for the purposes of this decision we will assume that the fact is so.

If a guardian or next friend has the power insisted upon, we desire to learn whence it is derived. It certainly is not given by express provision of law, nor can it legitimately be deduced from the personal custody of the ward, which imposes certain duties on the guardian which he must perform. We confess that, notwithstanding the very able argument of the counsel for the father of Mrs. Worthy, we are unable to regard the right to sue for a divorce in any other light than

as *strictly personal* to the party aggrieved. It is *solely under the control of the person injured by the infidelity of the other*; it is at the *volition* of that party whether a suit shall be begun and prosecuted or not. (See 2 *Kent Com.*, p. 100.)

This principle laid down by Chancellor Kent, if correct, is decisive of the case.

It is clear the wife gave no assent to the bringing of this suit; she is a confirmed lunatic, and from the first was *incapable of volition*. What though she should continue a confirmed lunatic, and the husband should continue by repeated adulteries to violate his marriage vow and duties?—the marriage cannot be dissolved at the instance and will of father, brother, or friend, whose feelings and delicacy may have been outraged by the conduct of the husband? *Their will* may not be *her will*; her will, *intelligent will*, only can be regarded by a Court, not theirs. It may be inconvenient and greatly to be deplored that such a state of things exist. Nor can it be remedied by law, without destroying the safe foundation on which the continuance of the marriage relation reposes—that of its being personal to the party aggrieved.

For the crime of adultery with which the husband is charged, the law has provided punishment, and the father or friend may prosecute at their will—but whether, after gross and repeated infidelities, the wife will continue to regard him as her husband, and live with him as his wife, is *for her decision only*. Death only can dissolve the marriage relation without *her* consent, and no divorce can or ought to be had in this or any case but through the agency and *will* of the injured wife.

Let the judgment be reversed, on the ground that the suit should have been dismissed, as it was improperly brought by a *prochein ami*.

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McIntyre vs. Green.

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PATRICK MCINTYRE, plaintiff in error, vs. JAS. M. GREEN,  
defendant in error.

NOTE.—WARNER, C. J., did not preside in this case.

Trespass *vi et armis* does not lie against a Surgeon of a military post, who makes a requisition of the commanding officer for a particular house, as in his opinion suitable for a hospital, it not appearing that the Surgeon participated personally, or rendered aid, or incited the forcible dispossession of the plaintiff.

JUDGE WALKER *dubitante*.

Trespass *vi et armis*. Nonsuit. Impressment. Tried before Judge COLE, Bibb Superior Court, May Term, 1866.

The petition alleged that the plaintiff was the owner of a certain close therein described; that on the 17th October, 1863, defendant, with force and arms, entered the same, and ejected him therefrom to his damage, etc., with various circumstances of aggravation. It was returnable to April Term, 1864, of said Court. At the trial, plaintiff's attorney read in evidence the answers of D. Wyatt Aikin, to interrogatories propounded by defendant, who stated in substance that he was Commandant at Macon, in said county, and that defendant was there also, by authority, as Surgeon of the post; defendant, "as was his duty," made frequent requisitions on him for hospital quarters, and, amongst other houses, insisted on securing defendant's house. Witness wished to know why so small a house was required, and learned that it was the *rendezvous* of convalescing soldiers, that defendant was warned about furnishing the soldiers with liquor, and threatened with having his house taken from him—a squad of soldiers got drunk and created disturbance of the sick. Orders had been received from General Joseph E. Johnston to him and to defendant first for five hundred, and so on to two thousand sick. Witness issued an order demanding the house for a hospital in twenty-four hours. Defendant closed it. Witness had it opened with as little damage as possible, and found the house empty, denuded even of its furniture:

all this occurred in the spring of 1864. Defendant had refused to rent the house, though offered one hundred per cent. more than it was worth. It was his duty to get hospital quarters upon requisition of Post Surgeon. This dwelling was impressed by witness upon a written requisition from Dr. Green; thinks no other dwelling was impressed.

The plaintiff examined PETER MCINTYRE, who testified: That he was plaintiff's brother; that his brother was bed-ridden with consumption; that a file of men, with an officer, broke open the house and put plaintiff and his furniture out of the residence of himself and family, and they were never restored to possession during the war. Witness applied to Dr. Green for his brother's restoration, and Green replied that he would not be restored, that the house was a liquor-shop, a business that sent many men to hell. Witness' brother had no other means of living.

Dr. BOON swore that at the time plaintiff was dangerously ill, and his recovery doubtful.

Mr. LUXQUEST swore that, at night, when he returned, he found plaintiff in back-yard, unsheltered, sitting on the ground, in a cold rain, and took him into witnesses' house till he got shelter elsewhere.

Colonel CHARLES HARRIS testified that he appealed to Akin not to turn plaintiff out while sick, and asked Akin what Dr. Green said about it, and whether Dr. Green directed or required it? The Court refused to let plaintiff give in Akin's reply to that question.

The evidence being closed, defendant's attorney moved for a nonsuit, which was granted.

Plaintiff's attorney, during the term, moved that said nonsuit be set aside, and for a new trial, upon the grounds that the Court erred in refusing to let Colonel Harris give Akin's reply to said question, and in holding the Act of 15th February, 1866, constitutional.

The Court refused to set aside the nonsuit, and refused a new trial, and plaintiff's attorney assigns said refusals as error.

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McIntyre vs. Green.

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This case was argued December Term, 1866, and held up.

S. T. BAILEY, attorney for plaintiff in error.

E. A. & J. T. NESBIT, attorneys for defendant in error.

HARRIS, J.

The facts disclose a timidity on the part of the military authorities in the discharge of a high duty, which, in my judgment, was very censurable. The preservation of the health and efficiency of the men under arms, demanded that the house of the plaintiff should have been closed, and his liquor poured out in the street. An indirect sort of proceeding was resorted to, to get possession of the house, under the idea of converting it into a hospital, and force, unauthorized force, was employed to accomplish what was defensible in the first view, but illegal in the last. But the question is, who used the force, who dispossessed the plaintiff violently? There is nothing in the testimony which inculcates Dr. Green, the Surgeon of the post, either as an actor or accessory. He simply made a requisition on the Commandant for a suitable building for an hospital, and indicated the house of plaintiff as fit for such purpose. I take it to be clear law, that the action of trespass *vi et armis*, for damages, cannot be maintained, except against a person participating personally in the force, or rendering aid to those engaged, or inciting the forcible dispossession. It is not pretended that he participated or rendered aid. A requisition made in the course of duty, though even had it been with an indirect end in view, cannot, without both an alteration and expansion of the technical meaning of the word "incite," be held to fall within its definition.

The decision below, dismissing plaintiff's suit, was placed on the ground that the defendant was protected by the Act of the Legislature, approved 15th February, 1866, for the relief of all persons who were *bona fide* soldiers of the army of the late Confederate States, for acts done or committed under an order or orders from any officer of the same; also, to relieve

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O'Kelly vs. The Athens Manufacturing Company.

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officers for any act done under orders from a superior officer. I will express no opinion upon this act, as to how far it can protect any one from personal accountability to damages, as there is no actual trespasser before the Court. The judgment below is affirmed solely on the *technical* principle herein stated.

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**JAMES F. O'KELLY**, plaintiff in error, vs. **THE ATHENS MANUFACTURING COMPANY**, defendant in error.

A *qui tam* action by the common law generally should be instituted in the name of the king.

By the (new) Code of Georgia, it should be in the name of the Governor, or Attorney General or Solicitor General.

It cannot be brought and prosecuted in the name of the informer unless a right *thus* to sue shall have been given *distinctly* by statute.

No legal right having vested in the informer by the institution of this suit in his own name, the act of the Legislature remitting the penalties incurred by manufacturing companies for failing to publish the names of their stockholders, is not violative of that clause of our State Constitution which prohibits the enactment of any law injuriously affecting any right of a citizen.

*Qui tam.* Motion for nonsuit decided by Judge HUTCHINS, Clark Superior Court, February Term, 1867.

James F. O'Kelly, in his own name, for the use of the County of Clark and of himself, brought *qui tam* actions against The Athens Manufacturing Company, The Georgia Manufacturing Company, and The Princeton Factory. The cases being similar, it was agreed that the judgment in one of them should be the judgment in all.

The substance of the petition is that, The Athens Manufacturing Company, a chartered company under the laws of this State, for the manufacture of cotton goods and cotton yarns, and required by statute to publish twice during each year, in a public gazette nearest their place of business, a list containing the names of each and every stock-

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O'Kelly vs. The Athens Manufacturing Company.

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holder, with the amount of stock owned by him or her, had failed so to do five times; to wit, once in 1863, and twice in each of the years 1864 and 1865, whereby it became liable to pay to said plaintiff \$5,000 for each of said failures, one-half of which forfeiture belongs to said county and the other half to the plaintiff. The failures being admitted, the defendants moved a nonsuit on the grounds: 1st. Because the action was in the plaintiff's private name, and not in the name of the State, or of the Governor, or Solicitor General; and, 2d. Because the penal statute on which the action was bottomed had been repealed since this action was brought, and the penalties incurred thereby remitted by the State.

The Court sustained the motion, and ordered said case dismissed. Upon this the plaintiff assigns error.

W. L. MITCHELL, attorney for plaintiff in error.

WM. HOPE HULL and J. HILLYER attorneys for defendant in error.

HARRIS, J.

The action "*qui tam*" was originally one given to the people at large, or rather the forfeitures and penalties prescribed by acts of Parliament were permitted to be sued for by any informer, the act, however, reserving a portion to the king, the poor, or some public use, and hence the name. A suit begun by the informer gave him an exclusive right, and was therefore a bar to other suits. This led offenders to procure their friends to begin this "popular" action, in order to forestall or prevent other actions. This abuse of the suit producing so much collusion, caused the enactment of 4th Henry 7th ch. 20. After this enactment, suits to recover penalties and forfeitures were brought most usually in the name of the king, upon the relation of the informer, and not otherwise, unless by statutory provision.

Such we believe to be a condensed statement of the law as it existed in England up to 14th of May, 1776.

But even if precedents might be found in England previous to 1776, in which the informer sued in his own name, they would not be obligatory on this Court, since we have a distinct statutory provision in our Code, section 3178, which prescribes that in penal actions allowed in pursuance of public justice under particular laws, if no special officer is authorized by such particular laws to be *the plaintiff* therein, the State, or the Governor, or the Attorney or Solicitor General may be the plaintiff. This certainly confines the *right of being plaintiff* in such suits to the persons enumerated, or the section is unmeaning and would be worthless. The suit here was instituted since this enactment. Neither the pleadings nor testimony show O'Kelly to be such officer, or to be authorized by the act which imposed the forfeiture sued for, to be the plaintiff in the suit.

Having by the institution in his own name of an unauthorized suit acquired no legal right to maintain or prosecute it, the motion made by him to allow the writ to be amended, by substituting the State or Solicitor General as plaintiff, was properly denied. Possessing no right to sue as he did, the argument which was pressed with so much earnestness and ingenuity on our attention, that the Legislature could not, by the act of the 5th March, 1866, Pamphlet p. 6, remit or release the penalties incurred by the act of 9th December, 1862, after suit had been brought by the informer, as it would divest a vested right in violation of our State Constitution, is deprived of all its force. Had the suit been in the name of the State or Governor, on his relation as informer, the question then as to the extent of legislative capacity to release the interest so acquired by him, would have demanded of us an interpretation of that clause of the Constitution of 1865 prohibiting the Legislature from passing any retroactive act injuriously affecting *any right* of the citizen. We forbear expressing any opinion on this question, as such expression is entirely unnecessary to the disposition of the case in the record.

Judgment affirmed.



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*Summerlyn vs. Dent and Dent, Ex'rs, &c.*

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**M. C. SUMMERLIN**, plaintiff in error, *vs.* **JOHN T. DENT** and **JOSEPH E. DENT**, executors of **WM. B. DENT**, deceased, defendants in error.

When the leading or controlling counsel, especially if he theretofore conducted the case on trial (although his name does not appear on the Judge's docket, and notwithstanding he was not directly employed by the party whom he represented), is absent by leave of the Court, the case should not be tried without the consent of the suitor.

Equity. Continuance. Absence of counsel. Decided by Judge UNDERWOOD, Coweta Superior Court, March Term, 1867.

So much of this heavy record as is material to an understanding of the decision of the case, is as follows :

Complainant moved the Court for a continuance, on account of the absence of his leading counsel, Benjamin H. Hill. The Court refused the continuance, because Mr. Hill had no leave of absence, and no sufficient cause for his absence was shown.

The cause was opened to the jury, and complainant was proceeding to submit his evidence, when the Court announced the receipt of a telegram from Mr. Hill asking leave of absence from the court, on account of indisposition.

Leave of absence was granted Mr. Hill.

Complainant thereupon again moved to continue the cause on account of Mr. Hill's absence, without whom he did not feel he could go safely to trial.

Defendant's solicitors objected to the continuance, because it did not appear that Mr. Hill was original or leading counsel in the cause, and stated that Wm. Dougherty, who filed the bill, had told them a week before then that he would, and Mr. Hill would not, attend that term of Coweta Court.

Mr. Dougherty was also absent.

Complainant's solicitors stated that Mr. Hill had represented complainant on a former occasion when there was a mistrial.

The complainant swore that he had employed Mr. Dougherty, and had never employed Mr. Hill; that Mr. Hill had

represented Mr. Dougherty, and complainant was satisfied with him ; would be content with his presence then, and had expected him to attend at that term of the Court.

The continuance was refused, the cause was tried, and resulted in a verdict for the defendants.

A new trial was moved for, because of the refusal of said continuance (among other grounds), and the new trial was refused by the Court.

This is assigned as error.

The Judge says, " On the final argument of the motion (for a new trial), I heard Mr. Hill's statement, but I could not allow it to operate on a decision already made."

B. H. HILL, L. H. FEATHERSTONE, S. FREEMAN, WM. DOUGHERTY, solicitors for plaintiff in error.

W. F. WRIGHT and HUGH BUCHANAN, solicitors for defendants in error.

HARRIS, J.

We refrain from the expression of any opinion upon the merits of the case in the voluminous record before us, and which were so elaborately argued by counsel, as the case can properly be disposed of for the present by the decision of the question as to the *continuance* moved for below.

An importance was given to the facts that Mr. Dougherty was the *original* counsel of Summerlin and that Summerlin had employed him only, and not Mr. Hill, which other facts in the case should have greatly diminished. Whilst the name of Mr. B. H. Hill does not appear to any of the papers, nor is marked on the docket (the mere memorandum book of the Judge), as solicitor for the complainant, the fact that he had appeared and conducted on a previous trial (Mr. Dougherty not being at the Court) the cause as leading or controlling counsel is not denied. The testimony besides shows that by a recent arrangement, just before the last trial, Mr. Dougherty had withdrawn entirely from the case, abandoned practice in that Court, and had turned over his entire

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fee and the case to Mr. Hill. Summerlin, though he had not employed Mr. Hill, was entirely satisfied with his representing him. In consequence of the sickness of Mr. Hill's family, he applied by telegram to the Judge for leave of absence from the Court in which the suit was pending, and leave of absence was granted.

When application was made by the local junior counsel associated with Mr. Hill for a continuance of the cause, on the ground of his absence with leave, it ought to have been allowed. Being *absent with leave*, all cases in which Mr. Hill was leading or controlling counsel were necessarily exempt from being tried during his absence, without the assent of the complainant and other counsel that it should be.

Let new trial be had.

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SHADRACK WALL, plaintiff in error, vs. BARTLEY MCCRARY, defendant in error.

NOTE.—WARNER C. J., did not preside in this case.

A new trial will be granted when the verdict is strongly against the weight of the testimony.

A charge unauthorized by the evidence is good ground for new trial.

Equity. Charge of the Court. Trial before Judge WORRILL, Marion Superior Court, April Term, 1867.

The case made by the bill is as follows :

Shadrack Wall, on the third day of December, 1861, sold and conveyed to Bartley McCrary lots Nos. 186, 199, and 200, and the half of Nos. 185 and 218 each, all in the fourth district of originally Muscogee, then Marion County, containing eight hundred acres, at and for the price of \$10,000, upon a credit.

It was to be paid for in installments, as follows : \$1,333.33 due — ; \$2,000.00 due 1st January, 1862 ; \$3,333.33 due 1st January, 1863 ; and \$3,333.33 due 1st January, 1864.

The first installment was paid, and all of the third was paid except \$700.85. After the last note became due, to wit, in January, 1864, McCrary proposed to pay off this last note and said balance on the third in Confederate Treasury notes of the old issue. Wall refused to receive them. Thereupon McCrary proposed that, if Wall would receive them and could not use them in payment of certain debts on Solomon Wall and Shadrack Wall as his security, that McCrary would take them back. With this understanding the same was received, and said promissory notes delivered up.

Afterwards, to wit, in January, 1864, Wall offered said Treasury notes to Mrs. Amanda Butt, who held a claim against said Solomon Wall and Shadrack Wall as his security, and she refused to take them.

During the same month, Shadrack Wall notified McCrary (through one J. T. Wall) of said refusal, and requested that he would call at Shadrack Wall's house and receive back said Treasury notes, according to said promise. McCrary refused to go to the house of Wall and take them back, and they have become worthless.

The prayer is for discovery, and that McCrary be compelled to pay said \$2,000.00 note with interest, and the balance on the third installment aforesaid, and the last installment aforesaid with interest; and that the said lands be sold for the purpose of paying the same; and for injunction against the sale of said lots by said McCrary.

The injunction was issued.

The defendant answered the bill, but complainant afterwards amended the bill by waiving an answer, and so the answer was not read to the jury upon the trial, as evidence.

The evidence was as follows :

#### EVIDENCE FOR COMPLAINANT.

Deed from complainant to defendant for said lands and at said price, dated 1st December, 1861.

The note of said date, due 1st January, 1862, for \$2,000.

SOLOMON WALL testified that he was present at the sale of said lands; the price was \$10,000.00, to be paid in gold;

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there was no Confederate money then in circulation ; the notes given were for \$1,333.33 and \$2,000.00 due 1st January, 1862, and for \$3,333.33 and \$3,333.33 due respectively 1st January, 1863, and 1st January, 1864 ; the numbers of the lots of land were specified in the notes, because the parties thought that that would constitute a vender's lien ; defendant examined the lands before the purchase ; the lands were worth the price in gold ; witness sold the land to complainant to pay debts for which complainant had become witness' security, and complainant sold them to defendant to raise money to pay those debts ; witness in 1863, at complainant's instance, tried to pay a debt due by witness to Lamar, of Macon, on which complainant was security, but Lamar refused to take the money ; witness requested complainant to receive no more such money from defendant ; in early part of February, 1864, complainant told witness that he, complainant, had received more Confederate money from defendant, which the complainant wished witness to pay to debts on which complainant was his security, and witness immediately called on Mrs. A. M. Butt, administratrix of E. C. Butt, deceased, and tried to pay such debt due her, but she refused to take such money ; witness told complainant of this refusal, and complainant requested him to tell defendant to come to complainant's house and take back said currency ; and some time after that, and a short time before the funding law was passed, witness, at an election of militia officers, told defendant of said refusal, and delivered said message ; defendant said he would go and get the money.

At the time of the sale, the grist mill was in tolerable order, and in the condition as represented to McCrary ; and the lands were seen and known to McCrary at the time, and were worth the price agreed on without the mill. The debt due to Lamar was \$2,300.00 and interest ; that due to Mrs. Butt was \$3,500.00 ; that due to the estate of Stubbs, about \$500.00 ; and that due to the estate of Battle was about \$1,500.00 or \$2,000.00.

JAMES T. WALL testified that he was requested by his father, Solomon Wall, to see defendant and tell him to go to

complainant and get the money which he had paid complainant; he saw defendant before the funding, and defendant said he would go to complainant's and get the money; that he promised to come back by complainant's when he went to Americus, but he could not, as he had to come by Buena Vista and bring Bulloch.

ELI G. PICKET (by interrogatories taken 25th January, 1867) testified that he was at complainant's house (about two years ago) about 25th January, 1864, overseeing for him and others; then saw defendant pay complainant \$4,000.00 in Confederate money; complainant refused at first to take it; defendant told complainant to take the money, as he, defendant, was going to Americus, and would be back next day, or the day after, and would then give complainant a written promise to retake the money if was not good or would not answer complainant's purpose; complainant said: "do it now;" defendant replied: "I can't do it now, but will as I come back from Americus;" don't know age of complainant, but he is very old and feeble, nearly helpless, and has little power of locomotion; this occurred in complainant's room, and he said he would take the money with that understanding, as he wanted the money to pay a debt (witness thinks a security debt), and wished not to take it unless he could use it for that purpose; complainant insisted on the written promise then, but defendant insisted on waiting his return from Americus, and he did not return there; witness says he charged his mind with the matter at the time, and has often thought of it since, and is clear in his recollection.

MARY GLOVER, complainant's daughter, testified by interrogatories in substance the same as Picket. She did not give the exact date. Was in the adjoining room and heard all the conversation; defendant's excuse for not giving the writing then was that he was in a hurry.

Complainant in his own behalf (by interrogatories) testified that the original note (copying it) was given for 800 acres of land; he stated the contract as set forth in the bill; late in 1862 or early in 1863, defendant paid him \$3,885.81 in Confederate Treasury notes, which was taken absolutely in

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part payment of said land ; about 1st January, 1864, defendant paid him about \$4,114.18, which he accepted conditionally ; he said this money was then dead ; defendant made the promise to make it good if it proved bad, and promised the writing to that effect on his return from Americus next day, saying that he himself had taken it conditionally, and if it was worthless he would take it back and return it to the person from whom he got it ; this was at complainant's house, in Schley County, Georgia.

The whole amount thus taken was funded in four per cent. certificates for Confederate bonds, which complainant now has ; before the payment of the \$3,885.80, witness had threatened suit if defendant did not pay, but after that payment he had not asked payment nor threatened suit.

Upon cross-examination, he stated that when this last payment was made to him he did give up to defendant two notes, but he gave them up conditionally : i. e., McCrary would take back the money if it was not good, and give back the notes ; Eli Picket, Mary A. Glover, and Georgia Glover were present at the time.

## EVIDENCE FOR DEFENDANT.

Defendant testified that he bought the lands and gave the notes as stated by the bill ; that he paid off all of the notes except one for \$2,000.00 ; that complainant represented the mill to be in good running order ; that it cost the defendant about \$1,200.00 in Confederate money to put it in good running order ; that said last payment to Wall was absolute, and he did not promise to take the money back if Wall could not use it, nor did he promise to put this in writing on his return from Americus ; but on his return from Americus he paid complainant \$800.00.

JAMES ADAMS testified that he put the mill in running order for defendant, but did not recollect how much had to be done to it ; he did not know what the lands and mill were worth ; the mill would yield \$500.00 or \$600.00 annually above expenses ; as a millwright, he thought the mill worth about \$200.00.

JOHN McMICHAEL testified that defendant borrowed \$1000.00 of Confederate money from him in January, 1864, for what purpose he did not state; the land sold by complainant to defendant is now worth \$8.00 to \$10.00 per acre; considering the condition of the country, last fall it would have been worth \$10.00 to \$12.00 per acre, perhaps more; it was a good place and pretty fair land.

WM. M. BROWN testified that sometime in January, 1864, defendant borrowed \$2,000.00 from him, as he stated, for the purpose of paying complainant.

HENRY PENN testified that complainant requested him to tell defendant, if he did not pay his notes he would sue him, sometime in the latter part of 1863 or first of 1864; that he so informed defendant, and defendant said that he would pay him, and started to Americus the next day; complainant lived on the road to Americus.

WILLIAM M. BUTT testified that he was one of the administrators of E. C. Butt, deceased, and that Solomon Wall came to him about 15th or 21st February, and proposed to pay a debt which himself as principal and complainant as security, owed said estate; witness agreed to take the money at first, but upon seeing Mr. Crawford, he refused to take it, (it was Confederate money) unless Wall would lose one-third which Wall refused to do; witness took Confederate money a few days before that time, (about \$5,000.00,) from a Mr. Montfort, and would have taken it from Wall had he offered it a few days sooner; witness knew the lands, and thought them now worth only \$7.00 per acre, owing to the condition of the country; by agreement with Amanda M. Butt, his co-administratrix, witness had the exclusive management of E. C. Butt's estate under the direction of Blanford & Crawford, Attorneys at Law.

Defendant also produced and read in evidence, the three promissory notes of same date with said deed, for \$1,333.33 due January 1st, 1863, for \$3,333.33 due 1st January, 1863, and for \$3,333.33 due 1st January, 1864, which he claimed to have paid off.



The Court charged the jury that it was for them to find whether or not this was a case where the consideration should be scaled down, in order to do equity between the parties ; that if they should find that false representations were made by Wall to McCrary touching the condition of the mills, and that the defendant acted on such in the purchase, then whatever it reasonably cost McCrary to put the mills in the condition represented, would be the measure of damages for such false representations, (this principle of law was conceded in the argument of the case, says the Judge); that it was the province of the jury, under the ordinance of the Convention and the evidence given in upon this trial, to adjust the equities of these parties and render a verdict upon principles of equity ; that in rendering a verdict between these parties upon principles of equity, both sides admit that the value of the land in present currency, would be the proper criterion by which to make an equitable adjustment of this controversy ; that after deducting the amount of purchase-money paid complainant by defendant, they would determine what the land was worth in present currency, and the amount of unpaid purchase-money together with interest, would be the amount of the verdict ; that it was admitted in the argument that defendant was to pay complainant for the lands and mills in Confederate money, and complainant admitting that a large part of the purchase-money has been paid, has filed his bill to recover something over \$6,000.00, which he avers is due to him from defendant, that defendant admits his liability to pay the \$2,000.00 note, but contends that the \$4,000.00 paid to complainant in January, 1864, was an absolute and not a conditional payment ; that this was the great question in this case, and if at the time the money was paid, complainant received it under an agreement that defendant was to retake it if complainant could not use it to pay certain debts whereon he was security for Solomon Wall, and the proof shows that he could not pay those debts with the money, and in a reasonable time he gave defendant notice of this and sent him word to come and get the money, and defendant said he would do so, then complainant would be entitled to recover

the \$4,000.00 ; but if the jury should find the evidence to be as contended for by defendant's counsel, that defendant was only to take back the Confederate money or make it good in the event it was worthless, and complainant has not proved it was worthless, complainant was not entitled to recover.

The decree was that complainant recover \$2,000.00 with interest from the 1st January, 1862, with costs ; that this be a lien of said lands, that they be sold and proceeds applied to pay said sum, and if proceeds thereof were not sufficient therefor, complainant should recover the balance out of other property of defendant. The assignment of error is that the said charge was erroneous generally.

B. HILL, BLANFORD & MILLER, solicitors for plaintiff in error.

B. B. HARTEEN, solicitor for defendant in error.

HARRIS, J.

1. There is a difficulty that this Court has to encounter very often, of passing upon the credibility of witnesses indirectly, who are utterly unknown to us, who are not sworn and examined in our presence,—which we feel very sensibly, and which furnishes generally the reasons for acquiescence in verdicts, especially when new trials are moved and refused by the presiding Judge. But cases sometimes come up which forbid that our practice should be unalterable—not to be modified. In this case all are paper witnesses. Three swear distinctly that the Confederate notes paid by McCrary were taken conditionally, *not absolutely*—that is, if old Mr. Wall could use these notes in payment of debts due by him—old man Wall being one of the three witnesses—and by them all circumstances attending the transaction are narrated. This body of testimony is really opposed only by the oath of McCrary in a general denial. If ever a verdict was rendered against the weight of testimony, this is the case. There must be a new trial on this ground. And whilst we award a new trial on the ground stated, we deem it proper to say

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we are neither satisfied with the instructions of the Court, nor the manner of submitting them to the jury.

2. We find nothing in the record to authorize that portion of the charge in reference to false representations by Wall as to the mills, and the measure of damages in such case. There are other portions which do not accord with our ideas, in the mode of submission pursued, which we forbear to remark upon, as the case goes back for a re-hearing; and if it should be returned here again, it will come back unembarrassed by admissions said to have been made by counsel in the progress of the trial, which counsel *here* assert were misapprehensions of what they said.

New trial ordered.

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JOHN H. ELDER, plaintiff in error, vs. ABSALOM OGLETREE, executor of JOSHUA ELDER, deceased, defendant in error.

NOTE.—WARNER, C. J., did not preside in this case.

Opinions of witnesses, other than subscribing witnesses to a will, unless in questions of sanity or insanity or those involving the admissibility of experts, are inadmissible as testimony.

If an ambiguity exists in a will made during the war, by the use of the word "dollars," and testimony has been admitted to show that, at the time of making the will, the currency where the testator lived consisted of Confederate Treasury notes, the value of such currency, as compared with gold, at the time of making the will, should be allowed to be proven, so as to enable the jury to collect the intention of the testator and render their verdict accordingly.

Assumpsit. Motion for new trial. Decided by Judge SPEER, Spalding Superior Court, February Term, 1867.

In August, 1863, JOSHUA ELDER, in said county, made and executed his last will and testament.

His bequests were as follows: Item 1st. Henry, Susan, Abbey and her two children, (slaves,) to his wife during life, and at her death, Henry to go to his daughter, Mary E.

Starr, and the heirs of her body, and Abbey and her children and their increase to his son Samuel.

2d. To said Samuel, George (slave), and one hundred acres of land described by metes and bounds.

3d. To James, his son, four slaves—Jane, Ciller and her two children—and a parcel of land described by metes and bounds.

4th. To his daughter, Nancy E. Hindsman, and the heirs of her body, Harriet, Anthony and Jordan, (slaves).

5th. To his daughter, Martha A. Molair, and the heirs of her body, certain lands therein described, and Tena, Malinda, Sherwood, Jack and Nathan, (slaves,) "by paying back \$500.00 to the estate."

6th. To David P. Elder, Amanda, America, Emanuel, Abe, Mary, Harriet and Calvin, (slaves,) with their increase.

7th. To his son, John H. Elder, a parcel of land described therein; "also six negroes, Caroline and her children, Jerry, Wood, David, and little Tiner, with all their increase, he paying back \$500.00 to the estate."

8th. To his wife the remaining lands during life; remainder to James, upon condition that he take care of his mother during her life; also furniture and various articles of personalty to be used by his wife while living, and at her death to be sold, and proceeds equally divided amongst "the children."

9th. The remnant of his property to be sold, and proceeds, after reserving \$150.00 to build a rock wall at the graveyard where he wished to be buried, to be equally divided between the children of Elizabeth R. Starr.

10th. All the money and notes of testator to be divided between the children last aforesaid as they arrive at age. John H. Elder appointed guardian for Benjamin M. Starr and Martha E. Starr.

11th. To his grand-son, Joshua H. Starr, \$300.00, and to his grand-daughter, Martha E. Manly, \$500.00 at his death.

12th. To James Coleman, Sr., to live on and cultivate the land on which he now lives and which he now cultivates as long as he wishes; and when he dies or abandons the same,

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then the land to belong to the testator's son, James R. Elder.

13th. Absalom Ogletree and Robert B. Anderson are nominated as executors.

Joshua Elder died, and Ogletree became his executor. As such executor Ogletree sued John H. Elder, alleging that, on the first day of January, 1865, said John H. being one of the legatees under said will, and having by said will bequeathed to him land worth \$2,000.00, which is more of his estate than testator intended for said John H.; said John H. elected and desired to possess the said land and pay the \$500.00 (which by the 7th Item of the will is made a charge upon it,) and then and there demanded of said executor and recovered possession of said land under said clause of the will, whereby said John H. became liable to pay said executor said \$500.00, etc.

The defendant plead *non assumpsit*, and that said will was made during the late war, when Confederate Treasury notes was the only circulating medium, and testator, in charging said legacy with the payment of said \$500.00, meant and intended that the same should be paid in said currency, which was then greatly depreciated, and plaintiff should not have more than the specie value of said \$500.00 in such currency: and further, that testator having intended this \$500.00 to be paid only in said currency, and said currency having ceased to be a circulating medium, there should be no recovery.

At the trial, after the will had been read in evidence, the plaintiff examined as a witness R. B. ANDREWS. Andrews testified that he knew the land mentioned in said 7th Item; that defendant took possession of it soon after testator's death, and had had it ever since; that defendant rented part of said land from the executor, and another part of it was rented to another person in 1864, and in 1865 defendant rented said land to freedmen; (witness did not know how defendant held the land;) that defendant also hired the negroes given him in 1864 from the executor; that there was no distribution of the property under the will, and the land is worth about \$5.00 or \$6.00 per acre, and there are probably about one hundred and forty acres of the land; that the

oldest field was rented at \$9.00 per acre in 1864, in Confederate money; that since the war, the land would not have rented for more than half what it rented for before; that Confederate money was generally in circulation when the will was made; that witness wrote the will; that testator died 28th August, 1863; that all the legatees got possession of the land and negroes given to them; that there was a contest about the will, and the executor hired out the negroes and rented the land for one year to the legatees; after that year (1864), they took charge of them in 1865 as their own, and exercised acts of ownership over them till the negroes were set free, but that he did not know under what kind of an agreement they took and held them.

Plaintiff proposed to prove by this witness the instructions and directions of testator to him at the time of making the will. This was objected to, because, as it was said, there was no such ambiguity in the will as could be explained by parol testimony, and because testator's sayings could not bind defendant, as he accepted the legacy, if at all, under the written will.

The Court said he would admit the evidence, as defendant had proved that Confederate money was in general circulation when the will was executed.

The witness then testified that in giving directions about drafting the will, testator said nothing about what kind of currency was to pay this charge of \$500.00; that testator said that he had intended to give Mrs. Elizabeth Starr's children \$500.00, but as it was uncertain what the money would be worth, as everything was so uncertain, that he would give them what his perishable property sold for, less said \$150.00; that testator always meant what he said, and said what he meant; when he said a dollar he meant a dollar: it is therefore my opinion that it was his intention that this charge should be paid in good money. Upon cross-examination, defendant, it being shown that Confederate money was the currency when the will was made, proposed to prove its value at that time. Plaintiff objected, and the Court sustained the objection, remarking that if defendant could prove

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that testator intended that the charge of \$500.00 should be paid in such currency, then he would admit the evidence.

Plaintiff then examined JOHN H. STARR, who testified that the said land was worth \$6.00 or \$7.00 per acre; that John H. Elder had the negroes given him from the executor for the year 1864, and rented the lands and kept possession of the negroes and land after 1864, then gave them up to the legatees; that John H. exercised acts of ownership over them, but under what agreement with the executor, witness did not know. In 1865, John H. Elder hired one of the negroes to Manly, and exercised acts of ownership over the land; that witness caveated the said will, and afterwards settled with the executor; that the executor gave up the property to the legatees 1st January, 1865, (witness was not present at the delivery,) under what agreement witness did not know, but from that time the legatees controlled the negroes as their own; that said will was not finally set up till November, 1865.

The verdict was for \$500.00, with interest and costs.

Defendant moved for a new trial on the following grounds:

1st. Because the declaration states that in consideration that defendant would and did accept voluntarily a legacy under said will, it being a tract of land, defendant undertook and promised, etc., when the proof showed that the consideration mentioned was a tract of land and six slaves, and there was no allegation or proof that said negroes were ever turned over as a legacy under said will.

2d. Because the Court erred in not allowing proof of the value of Confederate money.

3d. Because the Court charged that if the jury, from the evidence, believed that the defendant had elected to take the legacy under the will, and it had been paid and turned over to the defendant under the will as a legacy, then defendant was bound by his election, and the plaintiff might recover; and the jury, without evidence, and contrary to the charge of the Court, found said verdict.

4th. Because the Court erred in holding and in charging the jury that the facts and statements of the will of Joshua Elder constituted a case of election.

5th. Because the Court erred in permitting the plaintiff to prove what the testator said to the writer of his will as to testator's instruction as to what kind of money defendant should pay under his election, and holding that defendant was bound by the intention thus expressed, whether this intention appeared in the will or not, the Court holding that the will contained such an ambiguity as would allow parol testimony, to explain such ambiguity between plaintiff and defendant in this case.

6th. Because the jury found a verdict against the defendant contrary to the evidence in the case, contrary to the charge of the Court, and without any allegation in the declaration to authorise such verdict or testimony to sustain it.

7th. Because the Court erred in giving his opinion as to the testimony of R. B. Andrews, as to what he proved, to-wit: the Court said the testimony of the witness (to the effect that testator in giving instructions to the prothonotary, said he had intended giving Elizabeth Starr's children \$500.00, but everything was so uncertain, and the money declining in value, he had concluded to give them what the personal property sold for), proved anything else than that he intended this charge to be paid in Confederate money; and again refused to permit the defendant to prove the value of Confederate money. (The Court says this remark was not addressed to the jury, but to counsel, in giving to them a reason for rejecting the evidence.)

8th. Because the Court erred in stating in presence of the jury that this will contained a latent ambiguity, and that therefore he would hear parol testimony to explain it. (The Judge certifies that he held it contained such ambiguity, upon the motion of defendant's attorneys to allow such testimony, they contending that it contained such ambiguity, from the condition of the country and currency when the will was made.)

9th. Because the Court erred in refusing to allow defendant to prove the value of Confederate money after the plaintiff had closed his case.



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The record does not show what was the charge of the Court, nor is there any certificate, otherwisethan as aforesaid, that the statements in the motion for new trial are true. The Court refused a new trial, and this refusal (on said grounds) is assigned as error.

BOYNTON & DISMUKE,  
N. W. HAMMOND & SON, } Attorneys for plaintiff in error.

PEEPLS & STEWART, attorneys for defendant in error.

HARRIS, J.

The ordinance of the Convention, in November, 1865, applies in terms to contracts unexecuted (within two named periods) and were it to be strictly construed, no evidence whatever touching wills and other transactions, which do not technically fall within the denomination of contracts, as to currency, its value &c., could be admitted. Its spirit and intention was to include all transactions involving money or its representative, and to ascertain the truth of every agreement or design. And hence, as the defendant below was allowed to prove that, at the time of the making of the will, Confederate treasury notes was the prevailing currency, we think that the Judge erred in not permitting their value in market at the residence of testator to be given in testimony.

It is palpable, in considering closely the ordinance, that the Convention must have deemed the expression "dollars" in notes, accounts, etc., to be ambiguous in meaning, as carrying a doubt along with it as to what was meant, currency or gold and silver, or they would not have permitted the wide range they have in trying to arrive at the truth of every transaction at the time of it, and what was intended. We would not be understood as saying that because a depreciated currency had supplanted a better one, the worst was meant. Far, very far from it. We leave this to be settled upon testimony, positive or circumstantial, by the Jury. The many clauses of the will, the various sums of money to be paid to legatees so as to adjust and equalize their shares, (it being the general presump-

tion that such is the wish of every parent, unless the contrary is distinctly exhibited) furnish means from which an intelligent jury can collect, with pretty great certainty, what the testator meant, whether he meant gold or currency.

There was error in suffering Mr. R. B. Andrews, who was not a subscribing witness to the will, to give *his opinion* as to what testator meant. The fact that he was the amanuensis in drafting the will, does not, under the rules of evidence now existing, sanction his giving *his opinion*; he can testify as to facts only.

Judgment reversed.

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WM. NEWSOM, guardian, *ad litem*, of CELINA E. RAMSEY, vs. JESSE TUCKER, executor of BENJAMIN RAMSEY, deceased, defendant in error.

Whilst the recognition, by the State of Georgia, of the abolition of slavery in its borders, may have been destructive of legacies of that species of property, as also of the general testamentary scheme of a testator, such facts furnish no sufficient grounds of *caveat* to the probate of a will.

Probate in solemn form. Emancipation. Decided by Judge VASON. Lee Superior Court, April Term, 1867.

On the eighth day of January, 1865, in Lee county, Georgia, BENJAMIN RAMSEY, made and executed, in the presence of three witnesses, the following as his last will and testament:

\* \* \* \* \* ITEM 1ST. I give and bequeath to my daughters, Mrs. Penelope Carrol and Mrs. Martha Freeman, lot of land (No. 143) number one hundred and forty-three, in the (2d) second district of said county, to be equally partitioned off and the half falling to each, I give and bequeath to them for and during their natural lives, and at their death to such child or children as they may leave living at their death, and in no event to be subject to the debts, contracts or liabilities of any husband they may have.

ITEM 2D. I give and bequeath to my son, Henry C.

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Newsom, Guard. *vs.* Tucker, Ex'r.

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Ramsey, lot of land number one hundred and forty-seven, (147) in the (2d) second district of said county, together with all the improvements on the same, and negro boy Elick, about eleven years old, to have and hold them during his natural life, and at his death to such child or children as he may have living at his death, or may be born within the usual period of gestation thereafter, but in no event to be subject to his debts, contracts or liabilities. I further give and bequeath to him in fee simple my calico-colored horse, Celam, one bed and furniture, my small yoke of oxen and cart, one cow and calf and one sow and pigs.

ITEM 3D. I give and bequeath to my daughter, Rebecca A. Ramsey, lot of land number one hundred and forty-eight, (148) in the (2d) second district of said county, and negro girl Jaqueline, about eleven years of age, for and during the natural life of my said daughter, and at her death to such child or children as she may have living, and said land and negro in no event to be subject to the debts, contracts or liabilities of my said daughter, or any husband she may have. I further give to my said daughter, in fee simple, two cows and calves, one bed and furniture, and one sow and pigs. And I further will and desire that, my said daughter, as long as she remains single, be allowed to remain and live in the house where I now live. It is further my will and desire, and I hereby bequeath, with the lot of land herein given to my said daughter, all the improvements on the same, including gin-house and screw, and the sugar-mill and boiler, but my son Henry is to have the use of them as long as my said daughter lives in the house with him.

ITEM 4TH. It is my will and desire that all of my other negroes, not herein otherwise disposed of, be equally divided, share and share alike between my daughters, Penelope Carrol, Martha Freeman, Rebecca A. Ramsey, and my son Henry C. Ramsey, and my grand-daughter, Celina Elizabeth Ramsey, daughter of my son, Benjamin Ramsey, the share falling to each of them, for and during their lives, and at their death to such child or children as they may have living at their death, and in no event to be subject to their debts, contracts,

or liabilities, or the debts, contracts or liabilities of any husband they may have; and should my said grand-daughter die, without leaving child or children surviving her, then I desire her said share of negro property to be equally divided between my said children or their representatives, and I hereby appoint my friend, Jesse Tucker, of said county, trustee for my said children and grand-child.

ITEM 3D. I desire my executor, hereinafter appointed, to sell all my other property not otherwise disposed of by this will, at such time, after my death and under such circumstances, either privately or publicly, as may in his judgment be deemed best, and with the proceeds pay my just debts and the balance after the payment of my debts, I wish equally divided between my daughters, Mrs. Penelope Carrol and Mrs. Martha Freeman, provided said balance does not exceed two thousand dollars, and in the event it does, I desire the said excess to be equally (divided) between my daughters, Penelope Carrol, Martha Freeman, Rebecca A. Ramsey and my son, Henry C. Ramsey. My object in giving my two daughters Mrs. Carrol and Mrs. Freeman, the two thousand dollars in the event of there being that much, is to make them up the difference in the land, as nearly as I can. If, in the opinion of my executor, it shall be thought best to postpone a sale of my other property herein mentioned, he shall keep up my plantation until such sale, and not pay off the legacies or give off the property until after the sale. I desire such money as I may have on hand at my death, and such as may be collected from debts due me, to be put with the proceeds of the sale of the aforesaid property, and disposed of as the same is herein, in this item, directed to be.

ITEM 6TH. I nominate and appoint my friend Jesse Tucker, of said county, my executor to this will."

Upon application to prove this will in solemn form made by the executor, a *caveat* was filed by William Newsom, duly appointed guardian, *ad litem*, of said grand-daughter, Celina E. Ramsey.

The objections to the probate were:

1st. Because said pretended will was revoked, for the reason

that said pretended will constitutes one testamentary scheme, showing that it was the intention of said pretended testator, to divide his estate between his heirs-at-law, of whom there were five, Mrs. Carrol, Mrs. Freeman, Rebecca and Henry Ramsey, and his grand-child, Celina E. Ramsey, minor child of his son, Benjamin H. Ramsey, deceased, but that after the execution of said pretended will, and before the death of testator, such a change took place in the condition and situation of his estate that the 4th item of said pretended will, at and before his death, was inoperative and void, so that testator's scheme, disclosed by said pretended will was defeated and said will revoked, as it could not be presumed that said testator intended the other portions of said will to take effect, thereby disinheriting *caveator's* ward, in violation of his intention, expressed in said pretended will.

2D. Because said pretended will is void, for the reason that the 4th item of said pretended will conveying slaves, was at the time of testator's death illegal, and the said pretended will so constitutes, one testamentary scheme, that the remaining portions thereof cannot give effect to the testator's intentions, but on the contrary would violate his intention as disclosed by said pretended will, by disinheriting *caveator's* ward and one of his heirs-at-law.

3D. Because said pretended will is void for the reason that the whole of said will constitutes and discloses one testamentary scheme, the testator dividing his estate, consisting of lands, negro slaves, and other property, among all his heirs-at-law, showing that at the making thereof and at his death he believed he owned all the property conveyed by said will and intended to be conveyed thereby, and that the same would take effect and be beneficial to all the objects of his bounty as disclosed therein, whereas he was mistaken as to the kinds of property he owned and the value thereof and had no property, of any value whatever, in the negro slaves bequeathed by the 4th item of said pretended will, so that by reason of such mistake, his testamentary scheme as disclosed by said pretended will was destroyed, and said pretended will

is a violation of testator's intention and a fraud upon the rights of *caveator's* ward.

It was on the appeal by consent, and was by consent submitted to the Judge without a jury. *Caveator* waived the examination of more than one of the attesting witnesses.

The witness examined testified that he saw testator sign, seal, declare and publish the paper (aforesaid) as his last will and testament, that witness John H. Pope and Charles H. Conners signed the same as witnesses by request of testator, and in his and each other's presence; that at that time testator was of sound and disposing mind and memory; that at the time of its execution, testator owned three lots of land which composed his plantation in the 2d district of said county, containing about six hundred acres, twenty negro slaves and other personal property; that the land was then (when the will was executed) worth \$35 per acre in Confederate currency, and said slaves worth on an average \$2,000 or \$2,500 in said currency and his other personal property was worth \$6,000 or \$7,000 in said currency; that after the close of the war, and now said land was and is worth \$10 per acre in greenbacks, and all other personal property of testator (besides the slaves who were now free) was and is worth \$1,800; that testator died in November, 1865, during the session of the Convention of the State of Georgia, at Milledgeville; that the legatees named in said will are all of the heirs-at-law of said testator.

Propounder then read in evidence the will, and the testimony was closed.

The Court admitted the will to probate in solemn form. *Caveator* assigns this as error.

F. H. WEST, attorney for plaintiff in error.

WRIGHT & WARREN, attorneys for defendant in error.

HARRIS, J.

When the will of BENJAMIN RAMSEY, made in January, 1865, was presented for probate before the ordinary, a *caveat*

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was filed by the plaintiff in error, chiefly on the ground "that the will constituted one testamentary scheme, and that that scheme had been defeated by what subsequently occurred, to-wit: the emancipation of the slaves, by the recognition of the State."

Upon this the Ordinary was asked to refuse the probate of this will.

However unequal the legacies may have been made by the recognition in the State Constitution of the emancipation of slavery produced by the recent war, it is to us very clear that the Court of Ordinary has no jurisdiction over such a question. Its jurisdiction is limited by law to the making and execution of the will, and beyond the matters connected therewith it has no authority to go. The "*caveat*" was not decided by the Ordinary. An appeal by consent was taken to the Superior Court, and by Judge VASON the Ordinary was required to admit the will to probate.

We affirm the judgment.

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THOMAS W. HOWELL and FARLEY B. ADAMS, plaintiffs  
in error, vs. JOSEPH A. L. LEE, defendant in error.

NOTE. WARNER, C. J. did not preside in this case.

It is the well settled rule of the Supreme Court not to reverse a refusal to dissolve an injunction, upon the coming in of the answers of the defendants, unless it is made clearly to appear that the discretion of the court was improperly exercised in retaining the injunction.

Motion to dissolve injunction. Decided by Judge WORRILL. Superior Court of Muscogee County. November Term, 1866.

Farley B. Adams brought an action of ejectment, returnable to the November Term, 1858, of said Court, on the several demises of Thomas W. Howell and Farley B. Adams, against the defendant in error as tenant in possession, for the

recovery of lot number two hundred and sixty and all of lot number two hundred and fifty, (except ninety-two acres on the east side of it) in the tenth district of said county, and for mesne profits.

On the trial before the petit jury, said plaintiff introduced in evidence, a deed for the said premises from William B. Tinsley, (dated prior to the deed to defendant in error, hereinafter mentioned,) to Thomas W. Howell, and a deed from Howell to said plaintiff Adams. The defenses, of fraud and combination between Howell and Adams hereafter set forth, failed, and the plaintiff in ejectment recovered the premises in dispute and ——— dollars for mesne profits. Thereupon the defendant Lee appealed.

Lee then filed this bill, praying discovery, the cancellation of said deed from Tinsley to Howell, and injunction against said action of ejectment.

In said bill Lee alleged that on 16th February, 1856, he purchased said land from William B. Tinsley aforesaid, then of said county, but now of Russell County, Alabama, who was then and for many years before had been, in possession of it, claiming and holding title to the same, for which he then and there paid said Tinsley the price agreed on between them. As an exhibit, he attached to his bill a deed made in said County of Muscogee, of that date, for said land from Tinsley to himself. The consideration expressed in said deed is \$1,000.00. It purports to have been executed in presence of J. J. Rockmore and B. H. Davis, and afterwards, to-wit, on the 21st July, 1856, probated by Rockmore before "F. B. Adams, J. P." in said county. It was in the usual form of fee simple warranty deeds.

Complainant alleges that he immediately took possession of said land, and has held it as his own ever since under said deed. He recites the facts of the ejectment case aforesaid. He further states that the deed from Howell to Adams was made and dated long after his said purchase, and during his possession of the same, and by a combination between Howell and Adams to defraud him; that Tinsley was and had been for several years in possession of said land and certain slaves and



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other personalty, claiming them as his own ; that Tinsley was a weak-minded man, ignorant, easily duped and imposed upon by any one whom he counted as his friend ; that Howell was the executor of Tinsley's father, and possessed Tinsley's confidence ; that Howell or said Adams, or others at his or their instigation, as he was informed, induced Tinsley to believe that a warrant had been issued or was about to be issued against him for a crime, the punishment for which would be imprisonment in the penitentiary, and his property would be sacrificed ; that thus was he so alarmed that he hid himself for several days, and at a fit time for the purpose, Howell came and represented to him that the only way for him to save his property, was to convey it to Howell, taking Howell's notes therefor, then Howell would settle the difficulty and re-convey to him the property ; that Tinsley under said fear, made the conveyance of the said land and of all his personalty, even down to the chickens in his yard, and took therefor Howell's note for \$6,000.00, due twenty-one years after date, and induced Tinsley to believe that to guard and protect said property, it was necessary that he, Howell, should move upon the land.

Complainant avers that thus Howell took possession, when there was no such warrant, but only a report circulated by Howell for said purpose ; that some of complainant's friends having learned the facts, became indignant and declared their purpose to protect him ; and thereupon said Howell, having been in possession only a few days, took back his notes from Tinsley, induced Tinsley to believe he would deliver or destroy said deed, and moved off the land back to his home ; that Tinsley remained in possession during said time ; that complainant purchased of Tinsley without knowledge of any claim of any kind by Howell ; that Howell knew of his purchase and lived neighbor to him for several years, and made no claim to said land within complainant's recollection. It is alleged that Howell was insolvent ; said Adams knew said insolvency ; he knew Tinsley was weak-minded as aforesaid ; he was the justice of the peace who witnessed the deed ; he was cognizant of the fraud by Howell from the beginning ;

5th. Because the Court erred in permitting the plaintiff to prove what the testator said to the writer of his will as to testator's instruction as to what kind of money defendant should pay under his election, and holding that defendant was bound by the intention thus expressed, whether this intention appeared in the will or not, the Court holding that the will contained such an ambiguity as would allow parol testimony, to explain such ambiguity between plaintiff and defendant in this case.

6th. Because the jury found a verdict against the defendant contrary to the evidence in the case, contrary to the charge of the Court, and without any allegation in the declaration to authorise such verdict or testimony to sustain it.

7th. Because the Court erred in giving his opinion as to the testimony of R. B. Andrews, as to what he proved, to-wit: the Court said the testimony of the witness (to the effect that testator in giving instructions to the prothonotary, said he had intended giving Elizabeth Starr's children \$500.00, but everything was so uncertain, and the money declining in value, he had concluded to give them what the personal property sold for), proved anything else than that he intended this charge to be paid in Confederate money; and again refused to permit the defendant to prove the value of Confederate money. (The Court says this remark was not addressed to the jury, but to counsel, in giving to them a reason for rejecting the evidence.)

8th. Because the Court erred in stating in presence of the jury that this will contained a latent ambiguity, and that therefore he would hear parol testimony to explain it. (The Judge certifies that he held it contained such ambiguity, upon the motion of defendant's attorneys to allow such testimony, they contending that it contained such ambiguity, from the condition of the country and currency when the will was made.)

9th. Because the Court erred in refusing to allow defendant to prove the value of Confederate money after the plaintiff had closed his case.

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he was not, at the time of the trade with Howell, a weak-minded man, and in the management of property and money and in trading, showed considerable shrewdness, and could not be usually duped or imposed upon by any one;" Howell was Tinsley's intimate friend and his father's executor, but whether Howell had his confidence, he has not knowledge or belief. He denies that he ever did in any way frighten said Tinsley by the matters charged, as to the warrant etc., and does not believe that Howell did, or that Tinsley made the deed under such influence or circumstances as charged, or under a promise by Howell to re-convey to him. It is admitted that the purchase was of the comprehensive character described, and was, as he is informed and believes, in consideration of two hundred dollars cash and Howell's twelve notes for five hundred dollars, one to be due each year for twelve years after said trade, and that Howell took possession of the negroes and other personalty, and was in exclusive possession of said land four or five weeks, not fraudulently but in good faith. He answers that during part of this time Tinsley had left the plantation and was staying with his sister; that he, respondent, was not present at the agreement, but he believes there was some arrangement and partial cancellation of said trade, but not as complainant alleged; he is informed and believes that the deed was not to be delivered up, but that Tinsley was to have back all the personalty except one negro, and to have the privilege of living on the land, and that complainant knew all this at the date of his purchase. He did offer to sell Howell's title to Lee at one time, but Lee said it had been offered to him before, and that he would not purchase said title. His deed was not without consideration, but he paid Howell some money, a mule and a debt of three or four hundred dollars which he held against Howell; this was not full value, but that was because it was burdened with the lien of a judgment against Howell for about five hundred dollars.

He denies any knowledge of any fraud or improper inducements for said deed; witnessed it as a justice without any suspicion of fraud; and denies that Howell surrendered the

negro sued for, but believes that the negro was sold and five hundred dollars paid to Tinsley, and three hundred to Howell on compromise. He admits Howell's insolvency; that he, when Howell was about to leave the State, tried to sell the title to Lee in order to collect a debt, and so told Lee; but did not offer to take one hundred dollars or other sum, but Lee said he would not give a damned dollar for Howell's title, and it was after this that he purchased from Howell.

The answer of Thomas W. Howell alleged that he went into possession of said land for a valuable consideration, and in good faith took possession, and after six or seven weeks, under a new trade, moved out and left Tinsley in possession, upon condition that Tinsley was to remain on the land and have the usufruct as long as he lived; and if Tinsley left it at any time he was to forfeit his said right; that he bought it with no intended fraud, but took it upon the terms stated in Adams' answer (which was Tinsley's own proposition), promising, in addition thereto, to furnish Tinsley with board, washing, mending, &c., which was to be in lieu of interest on said debt. About six or seven weeks after that, Tinsley bought back all the property, taking the land on the terms aforesaid.

He answered that before he moved into said land he gave a mortgage securing conditionally to Tinsley all of the property therein contained, which conditions were that if at any time he failed to pay his regular installments to Tinsley, the trade was to be of no effect, and he was to lose all past payments and forfeit possession of the property. Adams knew nothing of the trade till next morning, when Howell (and Wm. B. Weed for a witness) went to have the papers signed; then and there the papers were read over to Tinsley and to the said Weed and Adams, and Tinsley said he was satisfied with the trade and delivered the deed. Howell was then going to Columbus, and said he would get his deed recorded, and Tinsley wished him to take the mortgage and have it recorded also; and Howell declined, saying, You had better attend to that yourself. Upon Howell's return from Columbus, Tinsley was highly elated with his trade, saying, "Now,

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by God, I will go where I please." Tinsley was not a weak minded person, nor is he aware he was so considered in the neighborhood, but a tolerably shrewd man, especially where money was concerned. After the trade had been made and the papers exchanged, he heard that there was a difficulty between Adams and Tinsley, because Tinsley had sworn to a lie, thereby involving Adams in a debt in which he was security; that the first direct information he had of this was by an offer of five hundred dollars to him by Tinsley if he would effect a reconciliation between Adams and Tinsley; he saw Adams, and Adams said if Tinsley would never speak to him he would pass and repass with him. He is informed and believes that Lee swapt lands in Fayette County with one Larkin Tinsley for the lands in Muscogee; that about the time Tinsley moved off, one James Anderson went into possession under this arrangement. Anderson came to respondent and said Lee wished to lease him the land for five years, but that he knew Lee's title was defective, and that if respondent would consent he would go on said lands and build; it was agreeable, and Anderson went into possession as respondent's tenant. Subsequently, some free negroes went into possession, who are believed to be tenants of Lee.

Afterwards respondent was about to go West, was in debt to Adams and others, and proposed to sell to him because Adams was contiguous to it, and respondent supposed he would purchase it for that reason. Respondent told Adams he would sell the land low, as he was in debt to him, and would take a mule or a horse if he would pay two executions which were against him. Adams said he would see complainant and offer him the land, and he believes he did, and that complainant said "he would not give a d—d dollar for Howell's title!" Respondent was nearly a year trying to effect a trade with Adams, and was meanwhile informed that Lee said that respondent was so poor that he could not enter a suit for the land, and he would hold it by Statute of Limitations. Respondent says he made the deed to Adams for a consideration satisfactory to himself. Respondent says that "there was no warrant or other process of law held before

Tinsley to terrify him or otherwise force him to sell said property, (and denies all fraud and fraudulent combination with Adams or others,) that all Adams ever said to respondent about Lee's false swearing, was several days before the trade made with this respondent, and all he then said was, that he had a good will to cut Tinsley's throat for the lie; that a short time before Tinsley moved away, respondent came home from Court Saturday evening, and found Tinsley locked up in the smoke-house and pretending to be very much excited, and upon inquiry Tinsley told this respondent that he was secreting himself because one Rich, to whom Tinsley owed seventy dollars, had been there for his money, and upon learning that Tinsley had sold all his property, threatened to levy an attachment on one or two little mulatto negroes which he had not sold to respondent, although they were at his house. Shortly afterwards respondent told Rich he would pay the debt; Rich was satisfied; and then Tinsley paid Rich. This was the cause of Tinsley's leaving the plantation and staying with his sister, who afterwards bought these little negroes. He charges that he believes that Lee took with knowledge of his deed, and upon the idea that he was too poor to assert his rights by law.

Respondent says Lee caused a *fi. fa.* for \$41.00 to be levied on the land, and somebody paid it off, and that Tinsley admitted in his lifetime to James M. Henry and Joseph Henry that it was respondent's land, he having the right to occupy till he died.

Respondent admits that trover was brought for the negro, but denies that there was any compromise, but says he sold the negro to one Gallup for a valuable consideration, and Gallup effected some arrangement with Tinsley whereby the action was stopped; he admits the cancellation of the trade except as to one negro, and that the deed was to be kept by him, with privilege to Tinsley to occupy as aforesaid. Tinsley some time after moved to Columbus. No one was present at this cancellation but some of respondent's family, and Adams knew nothing of it till the business was finally arranged, the papers destroyed, and respondent ready to

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move away ; and Adams always expressed great repugnance to trading for the land, but yielded to this respondent's solicitations in that regard. Respondent denies that he got only a nominal consideration ; he got a price satisfactory to him and a release from a considerable indebtedness to Adams, with a prospect of paying other liabilities, and also got a mule and some cash, amounting in all to \$600.00. He admits the land was worth more, but that was all he could get at the time. No one but Adams ever offered the land to Lee with respondent's knowledge or consent ; he heard that others had, but he believed it was in bad faith, to injure respondent's title. Adams made his offer without respondent's knowledge or consent, but afterwards told him of it and of Lee's reply, and said he would buy it and bring an action of ejectment for it, and did buy it as aforesaid.

Upon these answers the motion to dissolve was predicated. The Court refused to dissolve the injunction, and of this decision the plaintiff in error complains.

WM. DOUGHERTY, M. L. PATTERSON, represented by N.  
J. HAMMOND, solicitors for plaintiff in error.

WILEY WILLIAMS, solicitor for defendant in error.

HARRIS, J.

Notwithstanding the repeated decisions, from the very establishment of the Court itself, it seems very difficult to eradicate a prevalent but mistaken idea with members of the bar, that upon the coming in of the answer of a defendant, and swearing off (as it is called in common parlance,) the equity of complainant's bill, the injunction in the cause will, as a matter of course, be dissolved. The granting and the dissolution of injunctions must ever remain matters for the careful and sound discretion of the Judges of the Superior Courts. Injunctions are the most efficient instruments known to jurisprudence with which to enforce right and to protect against present or prospective wrong.

This Court is always reluctant to interfere, by ordering a dissolution, when the Judge below has refused such motion.

It will interfere whenever it is manifest to it that the discretion was abused or unsoundly exercised. We do not think the refusal here calls for a reversal.

Judgment affirmed.

SOUTH-WESTERN RAILROAD COMPANY, plaintiff in error, vs.  
THOMAS PICKETT, defendant in error.

NOTE.—WARNER, C. J., did not preside in this case.

If a Railroad Company allows a slave to go off on their cars without a ticket or permit from the master, overseer, or person controlling the slave, the Company is liable to the owner for damages. It is so by our statute.

However white in color such slave may be, that fact cannot be considered by Courts as excusatory of the Railroad Company, or altering the owner's right to damages.

Trover. Tried before Judge VASON. From the Superior Court of Sumter County, April Term, 1867.

This case being upon trial, plaintiff introduced JOHN V. PRICE, who swore that he had in his possession the negro Amanda; that plaintiff had left with him on sale a negro man who belonged to the plaintiff, plaintiff's mother and brother jointly, and said negro man had been swapped for Amanda. She was a good cook, washer, ironer, seamstress, and house-woman, worth \$2,500.00, and worth for hire \$150.00 *per annum*.

In the fall of 1860, Amanda went away on the Southwestern Railroad, and remained away a year and a day, and was then brought back by the agents of the Company, the Company having exerted themselves to recover her from the date of her leaving. She had a ticket and went on a train on which Mr. Hancock, an employe of the Company, though not an agent or a conductor, also went to Macon. Witness went to Macon in pursuit of her, at an expense of fifty dollars.



Upon cross-examination, he stated that she was as white as himself, &c.; and that no one who did not know her and her *status* would have suspected that she was a slave; and that she went away on Sunday. It was admitted that she paid the Company for the ticket which she had.

The plaintiff closed. Defendant introduced no testimony.

After the argument and charge of the Court, the jury gave a verdict for \$207.00, with costs.

During the argument, defendant's attorney requested the Court to charge the jury "that in order to recover, plaintiff must prove property in himself, and right of possession at the commencement of the action, possession by defendant, and a demand and refusal, from which a conversion was presumed or inferred; also, that there must be negligence on part of defendant, and that the color of the girl Amanda, being white, the defendant was justifiable in selling her a ticket, for the presumption was she was a free woman; and plaintiff having proved property in himself and two others, he could not recover in that event, for there was a variance between allegations and proof."

The Court refused so to charge, and charged that no matter what was Amanda's color, if the defendant allowed her to go off on their cars without a ticket from her owner or controller, the defendant was liable for her hire.

For this refusal to charge, and for the charge as given, the plaintiff in error asks a reversal of the Court below.

JAMES J. SCARBOROUGH, attorney for plaintiff in error.

W. A. HAWKINS, attorney for defendant in error.

HARRIS, J.

It is the stern enactment of the Legislature that if a Railroad Company allow a "slave" to go off on their cars without a ticket or permit from the master, overseer, or person controlling said slave, the Railroad Company shall be liable therefor in damages to the owner. There is no question in the case as to whether Amanda, the mulatto woman, when

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taken on the cars of the Company, was a slave or not, and the property of Pickett. These facts admitted coerce an affirmation of the judgment below. However white in color, as it seems she was (though she had negro blood in her veins), we have no power to regard that fact as excusatory or altering the right of the owner to a recovery of damages.

This is, in its peculiar character, a hard case on the Railroad Company; but such an one cannot, since the abolition of slavery, occur again.

Judgment affirmed.

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GILES SHUTE, plaintiff in error, vs. THE STATE OF GEORGIA,  
defendant in error.

The vesting, by the Legislature, in County Courts, the trial of minor offences, including simple larceny, does not confer on such Courts *exclusive* jurisdiction. Under the Constitution, *concurrent* jurisdiction remains in the Superior Courts.

Larceny. Jurisdiction, etc. Tried before Judge VASON. Calhoun Superior Court, March Term, 1867.

The indictment charged plaintiff in error with the larceny of a bushel of corn, worth one dollar, the property of Dr. F. W. Cheney, on the 8th September, 1865, in said county. The plea was not guilty.

The State introduced and examined as a witness JACOB S. BAKER, who swore: Hearing the corn being broken, he looked and saw defendant breaking and pulling the corn off the stalk and putting it into his wallet—he pulled some fifteen or twenty ears. It was in Dr. Cheney's field, in said county, in the fall of 1865. Witness was then overseeing there. It was about thirty steps from the fence, and from that point defendant walked across to the opposite side of the field and got over thence to the right. Witness had frequently seen defendant going this route to feed his hogs; he was going rather away from home. Witness did not speak

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to defendant then, but followed him to the fence where he expected him. It occurred about two hours of the sun in the evening. Witness thinks from the signs of mud, etc., as much as two wagon loads of corn was taken from the field before it was gathered. Witness is neighbor to defendant and friendly with him. Defendant got out of the field at a road and took it; the road was an open road; the field is very near Morgan.

The State closed. Defendant introduced no testimony. He offered himself as a witness in his own favor, but the Court refused to allow him to testify. The jury found the defendant guilty, and he was sentenced to jail for forty days.

The record does not contain the charge of the Court, but the Bill of Exceptions states that the grounds taken in the motion for new trial are true.

The defendant moved, during the term, for a new trial, upon the grounds: 1st. Because the Court refused to allow defendant examined as a witness in his own favor.

2d. Because the Court erred in charging the jury that if the defendant took and carried away the corn, not to account to the owner in future, the same was larceny.

3d. Because the verdict is contrary to law and to the evidence. In this Court, plaintiff in error contended that the proceedings were void, because the Superior Court had not jurisdiction of misdemeanors.

LYON, DEGRAFFENREID & SHORTER, attorneys for plaintiff in error.

N. A. SMITH, *Solicitor General*, for defendant in error.

HARRIS, J.

The sole question on this record is whether, by the creation of the County Courts, an *exclusive* jurisdiction was not conferred on them for the trial of minor offences, as simple larcenies, etc., etc. A careful examination satisfies us that *exclusive* jurisdiction for the trial of such minor offences was

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Kennon & Klink vs. Evans, Gardner & Co.

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not conferred on the County Courts, but that by the Constitution of the State, *concurrent* jurisdiction remains in the Superior Courts.

Judgment affirmed.

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KENNON & KLINK, plaintiffs in error, vs. EVANS, GARDNER & Co., defendants in error.

1. The allegation in an affidavit, "that the said Kennon & Klink are removing their property to be removed beyond the limits of this State, and that said John F. Klink is absconding," is a substantial compliance with our attachment laws, which are now to be *liberally* construed.
2. That the affidavit contains two grounds on which the attachment issues, instead of one, is not a good objection to the attachment.

Motion to dismiss Attachment. Decided by Judge CLARKE. Clay Superior Court, February Term, 1867.

The affidavit upon which this attachment was issued was in this language: "Personally appeared before me THOMAS K. APPLING, attorney at law, for Evans, Gardner & Co., represented by T. W. Evans, R. C. Gardner, W. B. Buckner, W. H. Evans, T. D. Feto, W. Porter, and R. W. Jennings, \* \* \* who, on oath, says that the firm of Kennon & Klink, represented by R. E. Kennon and John Klink, is justly indebted to said firm of Evans, Gardner & Co. in the sum of fifty-two hundred and fifty-nine dollars and ninety-one cents: two thousand five hundred and thirty-three dollars and seventy-six cents is due, and two thousand seven hundred and twenty-six dollars and fifteen cents soon to fall due, and that the said Kennon & Klink are removing their property to be removed beyond the limits of this State, and that said John F. Klink is absconding."

The attachment was levied 30th November, "on the goods claimed by C. A. Klink," and 1st December following "on the goods in the store of Kennon & Klink."

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Kennon & Klink vs. Evans, Gardner & Co.

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The Bill of Exceptions recites that a motion was made to dismiss the attachment "on grounds appearing on the face of said attachment affidavit."

The Judge, in his certificate, says the motion was on two grounds only: 1st, "That the allegation in the affidavit that the defendants are removing their property to be removed beyond the State, is not a good cause of attachment; and 2d, That the affidavit contains an additional ground, to-wit: that John F. Klink is absconding," and that with this qualification the Bill of Exceptions is true, etc.

The Court refused to dismiss the attachment, and this decision is assigned as erroneous.

WM. DOUGHERTY and A. B. SEALS, represented by N. J. HAMMOND, attorneys for plaintiffs in error.

DOUGLASS & APPLING, attorneys for defendants in error.

HARRIS, J.

1. Under the attachment laws, previous to the adoption of our Code, the exceptions taken to the affidavit on which the attachment issued in this case, would very probably have been sustained; for the Courts were required to hold all proceedings void which did not strictly conform to the provisions of said laws. We apprehend that the Legislature, by simply requiring now a substantial compliance in all matters of form relative to attachments, and omitting the declaration of their being void for non-conformity, has entirely changed the rule of interpretation which had theretofore existed.

Subjected to a fair and liberal construction, the first ground on which this attachment was sought, viz:—"that they are removing their property to be removed beyond the limits of the State,"—is substantially equivalent to an allegation that they are causing their property to be removed beyond the limits of the State.

2. The other ground, also, "that John F. Klink (one of the copartners,) is absconding," strikes us as embodying the idea conveyed by the words "he absconds."

## Floyd vs. The State of Georgia.

<sup>1</sup> Either ground as sworn to seems to be a substantial compliance with the provisions of the Code, and would have entitled affiant to the attachment sought.

We cannot comprehend the force of the objection that affiant has included two grounds upon which attachments issue, instead of confining himself in his affidavit to one. The Code prescribes six grounds, and if they could co-exist, and a debtor brought himself within them all, we do not perceive any sufficient reason why the creditor might not set forth all—it would be, at most, but “ridiculous excess,” as the existence of one ground is always sufficient.

Judgment affirmed.

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ANDREW J. FLOYD, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

NOTE.—WARNER, C. J., did not preside in this case.

Unless there be great superiority in physical strength of an assailant, who strikes another a blow with his fist, or ill-health in the assailed at the time, or other circumstance producing relatively great inequality between them in combat, the assailed cannot justifiably resent the blow by stabbing the assailant.

The general rule is, that whether the stabbing is in self-defence depends on the nature and violence of the assault made on him who stabs.

Indictment for Stabbing. Motion for new trial. Decided by Judge HOLT. Burke Superior Court, November Term, 1860.

Floyd stood conversing with the two Messrs. Brinson. He had open in his hand such a knife as farmers carry, and was perhaps whittling or cleaning his finger nails.

Whilden approached and asked Floyd if he had been accusing him of collecting money for his (Floyd's) slave and stealing it. Floyd said he did. Immediately Whilden struck Floyd with his fist, and Floyd stabbed him, and pur-

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Floyd vs. The State of Georgia.

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suing Whilden, who walked backward, continued stabbing him.

Whilden drew his knife; Floyd ran; Whilden caught him and stabbed him. An interval occurred while each was examining his wounds: Whilden got an axe-helve, ran after Floyd, (who retreated,) and beat him.

The Court charged the jury that, if they found against the defendant the fact of stabbing as alleged in the indictment, they must inquire whether or not the stab was inflicted in defendant's own defence; that the degree of violence which defendant might use, and the weapon he might employ, must depend upon the nature and violence of the assault. The Court read to the jury the twelfth, thirteenth, fourteenth, fifteenth and sixteenth sections of the fourth division of the Penal Code, relating to homicide, as the law governing the measure and extent of self-defence in this case.

The jury found the defendant guilty.

He moved for a new trial upon the grounds—

1st. That the verdict is contrary to law.

2d. That the verdict is strongly and decidedly against the weight of evidence.

3d. That the verdict is contrary to law and evidence.

4th. That the Court erred in charging the jury in manner and form aforesaid.

The Court refused the new trial, and defendant excepted.

JOHN K. JACKSON and JONES & STURGIS, for plaintiff in error.

ALPHEUS M. RODGERS, attorney-general, by AKERMAN, for the State.

HARRIS, J.

The general rule in criminal law in reference to assaults made on a person, and how they may be repelled *defensively*, is that contained in the charge of Judge Holt to the jury, which tried this indictment, "that whether the stabbing by plaintiff in error amounted to *self-defence*, depended on the

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nature and violence of the assault made on him." In this case the plaintiff in error received a blow with the fist of the assailant. As it does not appear by the record that there was great superiority in physical strength on the part of the assailant over that possessed by Floyd, nor it appearing that Floyd was in ill-health at the time, nor other circumstance existing at the time which produced relatively great inequality between them for sudden combat, we are not able to find any fact in the case which could justify him in repelling the blow of the fist by the use of his knife. As a general rule, it may safely be asserted that the law will not excuse or justify a man who repels a blow given him with the fist, by stabbing the assailant.

Judgment affirmed.

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AUGUSTUS R. RAIFORD, plaintiff in error, vs. JAMES HYDE,  
defendant in error.

Possessory warrants cannot be sustained when brought against public officers, as Sheriffs and Constables, to recover *possession* of property levied on by them in the course of their official duty.

A person aggrieved by a levy on his property, he not being a defendant in the attachment or execution, has his remedy by a claim or action of trespass against the officer.

Possessory Warrant against Sheriff. Decided by Judge VASON, Chambers, March, 1867.

Raiford, as Sheriff of Sumter County, levied an attachment in favor of Chas. T. Goode vs. Thomas V. Hyde, upon certain carpenters' tools.

While he had possession of the tools under that levy, James Hyde sent out a possessory warrant against Raiford, claiming that he was entitled to the possession of said tools.

The warrant was issued and the case tried by Judge VASON. The evidence was as follows :

JAMES HYDE swore that said tools formerly belonged to



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the firm of Hyde Brothers, composed of himself and Thomas V. Hyde; that on the 1st March, 1867, said firm was dissolved, and on that day the tools were turned over into his possession as his own; that they were his own; that he had been in the peaceable and legally acquired possession of them till said Raiford took possession of them without his consent; that he and Thomas V. Hyde were both insolvent, and these tools were then the implements of his trade, and were also the tools of himself and brother during said partnership as mechanics.

RAIFORD testified that he levied on the tools on the 8th March, 1867, under said attachment, as the property of Thomas V. Hyde, who had absconded, and held them under and by virtue of that levy. The attachment was admitted to be regular.

The Judge ordered the tools turned over to James Hyde, without requiring any bond to have them forthcoming to answer any judgment, &c., which Raiford might obtain against him for the same.

Plaintiff in error assigns "said order" as error. The Judge certifies that he required no bond, "for the reason that Raiford claimed no title or interest in the property, and only acted as Sheriff, and I held his levy to be a trespass.

C. T. GOODE, N. N. SMITH, (represented by MORGAN,) attorneys for plaintiff in error.

W. A. HAWKINS (represented by N. J. HAMMOND), attorney for defendant in error.

HARRIS, J.

Raiford, a Deputy Sheriff of Sumter County, levied an attachment on carpenters' tools belonging to James Hyde, a person not a party to the proceeding. James Hyde sued out a possessory warrant against this officer, and the question made is, "Is James Hyde entitled to this summary remedy against the officer?"

Upon examining carefully the Act of 1821, we cannot

think that the Legislature ever contemplated that Sheriffs and Constables should be made, as such, in the discharge of their ministerial duties, amenable to this summary proceeding. To sanction it would be to sacrifice the interests of the public, as the inconvenience which would arise from sustaining the right claimed would be incalculable. Public policy demands of us an interpretation which will avoid it. We leave the party injured by the levy on his carpenters' tools to his action of trespass against the officer, or to his claim of the property levied on—put in as directed by statute—or both. The redress may not be quite so quick, but if he has been damaged it is to be presumed that a jury will award in a proper case as much as he is entitled to.

Judgment affirmed.

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J. M. & R. W. WADE & Co., plaintiffs in error, vs. THOMAS H. STOUT, defendant in error.

WM. L. MITCHELL, plaintiff in error, vs. DAVID WILLIAMS, defendant in error.

Special Bailiffs, created by the County Court acts, are substantially, in their duties and powers, Constables.

Attachments, though not directed to them by name, when served by them returnable to the Superior Courts, will be sustained as legal.

Attachment. Motion to dismiss levy. Decided by Judge CLARKE, Early Superior Court, April Term, 1867.

These attachments were returnable to the Superior Court of Early County. The levies were made by the Special Bailiff of the County Court of said county. Defendants replevied the goods. Upon motion of defendant's attorney, said levies were dismissed by the Court, upon the ground that the Special Bailiff was not authorized by law to levy the attachments.

This decision and order of the Court is assigned as error.

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Wade & Co. vs. Stout—Mitchell vs. Williams.

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There is no record (the cases are here on agreed state of facts), and it does not appear who issued the attachments.

S. S. STAFFORD, LYON, DEGRAFFENREID & SHORTER,  
attorneys for plaintiffs in error.

R. HOLMES POWELL, attorney for defendant in error.

HARRIS, J.

By the Act creating County Courts their executive officers are called Special Bailiffs, and they are invested with as full powers in the general performance of their duties as are Sheriffs—more powers than are given to Constables, the officers of Justices' Courts. Substantially, in all their powers and duties, they are Constables. It would be strangely anomalous were we to hold that a class of officers intermediate in grade between Sheriffs and Constables were not designed by the Legislature to be fully competent to perform the ministerial duties that are required of the lower class of such officers. As the Act is indefinite, it is our duty to give it a liberal construction, so as to fulfill what we think the Legislature must have intended; and therefore we hold that although attachments are not *directed* to them by name, as they are "to Sheriffs and Constables," these writs may be served and returned by "Special Bailiffs" of the County Courts as fully and subject to the same rules as if served and returned by "Constables."

Judgment reversed.

JOHN T. DICKINSON, *et al.*, plaintiffs in error, *vs.* TALIAFERRO JONES and JESSE M. THORNTON *et uxor*, defendants in error.

Threatened waste or destruction of timber land, by sawing up the timber or deadening timber land preparatory to opening it for cultivation, or cutting the wood for firewood and sale, by any life-tenant or person claiming through such an one, will be promptly and efficiently restrained by a Court of Equity upon application by any remainderman.

(The Chancellor is ordered to grant the injunction.)

*Rule nisi* for injunction. Decided by Judge VASON, Chambers, April, 1867. Dougherty County, Georgia.

JOHN T. DICKINSON, for himself, and in right of his wife, Julia, and his children, Henry G. Rogers and John T. Dickinson, Jr.; and William Q. Dickinson, for himself and his wife, Cornelia, and as trustee for the wife and children of Richard A. Dickinson, deceased, to wit: Archibald and Zelima Bell Dickinson, averred that the aforesaid are the children and grand-children of Roger Q. Dickinson, late of said county, deceased, and as such are entitled to an estate in remainder, in a certain plantation in the 1st District of said county, described in the third item of the will hereinafter set forth, containing 1,500 acres, more or less, which was devised by said Roger Q. Dickinson, by his last will and testament, to his wife, Catharine.

In support of this averment they attached as an exhibit to said bill a copy of said will, the items of which are as follows:

ITEM 1ST. I desire that my executors, as soon after my death as possible, from the sales of crops and other means I may have, shall pay all my just debts.

ITEM 2D. I have heretofore advanced to each of my sons John T. and Richard A., in lands, negroes, stock, &c., amounting to the sum of \$8,000.00 each, which said property I hereby convey to them in fee; for the purpose of making my wife, Catharine, and my son William Q. equal with my said sons, I do hereby give to my wife, Catharine T. (in lieu of her

dower interest,) to be held by her in fee forever, the following property: (here follows the names and ages of four slaves;) also, three choice mules, ten head cattle, twenty head of stock hogs, provisions for negroes and stock for one year, and my carriage and match-horses; which property I estimate to be worth \$8,000.00.

The balance of this item is a bequest to William Q. of slaves and other personalty to the same amount.

ITEM 3D. I wish my plantation lying east of Flint River, in the First District of Dougherty, to be divided into two parcels, by a line as follows: beginning at the south-west corner of lot number 193 and the south-east corner of 199, thence north on the line to the Flint River, all the land lying west of that I do hereby give to my wife, Catharine, during her life, with remainder over to my children, as hereafter provided: the eastern portion of said plantation I do hereby give to my son William Q., to be held by him as hereinafter stated.

ITEM 4TH gives to his son John T. certain lands therein described, to be held by him "as hereinafter provided."

ITEM 5TH gives to his son Richard A. certain lands (describing them) in fee, and certain other lands (describing them) to be held and enjoyed by him "as hereinafter provided."

ITEM 6TH. "The whole of the balance of my estate, both real and personal, I wish to be equally divided between my wife, my sons, John T., Richard A., and William Q., share and share alike, that part of share to which my wife may be entitled, as well as the lands hereinafter devised to her, to be enjoyed by her during her life, with remainder over to my children." The remaining parts of this item directed that the property given to said John T. and William Q. (except that given in fee) shall be held in trust by each of them for his and his wife's support, and for the support and education of their respective children, not to be subject to the husband's or wife's liabilities or contracts, and at their respective deaths to vest in their children; and the executors shall hold Richard A.'s (except that given him in fee) upon the same terms,

with power in the executors to deliver the same to Richard A. when they are satisfied that he is steady and provident.

ITEM 7TH. Should either of my boys die without leaving children or wife him surviving, the whole of the property herein conveyed, except such as is given them in fee, shall be divided equally between my surviving children. Should either of them leave a wife and no children, then the wife to have a lifetime estate in the same, with remainder over as herein before stated.

The balance of the will directs the lands to remain undivided till the crop shall be gathered; gives the executor power to sell at public or private sale, on such time as they think best for the estate, and appoints said Catharine, said John T., and David A. Vason, executors. [It was made 29th April, 1858, and probated 14th June, 1858.]

They averred that said Catharine took possession of said plantation under and by virtue of said will, and married John Thornton, who took possession of it by virtue of said marriage; that when testator died, and when Thornton so took possession, said lands were used as a plantation for farming purposes, and were so desired [designed]; but since that time, said Thornton has [injured] and is injuring and damaging the said plantation, by cutting and selling off said lands the most valuable timber upon the same; to wit, large quantities of ash and hickory from the river lands, to the permanent injury of said plantation, which is not necessary to the enjoyment of the plantation for farming purposes; that Thornton has contracted to said Jones the privilege of using the timber on the woodlands belonging to said plantation, for the purpose of being sawed up into lumber; and said Jones is preparing to erect a steam saw mill on or near said lands, for the purpose of sawing up said timber.

Timber is becoming scarce in the neighborhood of said plantation, and if these things are persisted in said remainder estate will become of little value.

They further averred that there is an abundance of open land on said plantation for the full and free enjoyment of said life estate; but Thornton and Jones are having a large quan-



tity of timber deadened, merely as a pretext to cut the same into lumber; that this is pine timber, which, for rails and other farming purposes, is very valuable many years after it is dead. Many of the remaindermen are mere children, and this remainder estate is almost all they have, and said defendants are not able to pay damages. Without restricting the proper use of said life estate, they prayed an injunction against the acts of waste aforesaid.

The Chancellor granted an injunction to last until the hearing, and ordered the defendants to show cause why he should not extend it.

Thornton and Jones each answered the bill, and admitted all the charges in the same, except as follows:

Thornton says that in right of his wife, the life-tenant, he is entitled to all the enjoyment of said life estate in as full and ample a manner, for that term, as though a tenant in fee; and in exercise of that right he sold and conveyed to said Jones his entire interest in one of those lots; that he is not bound to use the property as a plantation only, but in any way he sees proper, so that he does not ruin or destroy the freehold. He denies that he is injuring or damaging the plantation; says he has cut and sold a small quantity of the ash and hickory off some of the swamp lands not susceptible of cultivation, leaving enough timber on the land to furnish all the plantation will need till the lands will be worn out. He denies that there is sufficient open land on the plantation, stating that testator gave his wife fifteen or twenty able hands; that the cleared lands were not sufficient for this force, and some of it was worn out, and he had a right to clear more; and that this clearing will not injure, but will benefit the remaindermen's estate by \$2,000.00. He states that after the sap has rotted from deadened pines, they are sometimes used for rails, when green timber cannot be had; but that there will be sufficient green timber on this plantation till it is worn out and worthless; that Jones is intending to saw up only the timber already dead and decaying on the land, and unsuitable for rails; and that he (Thornton) intends clearing no more, as he now has sufficient cleared. He says nothing as to insolvency.

Jones' answer is the same, with these variations: He says the deadening of the timber was only for purposes of cultivation; that he has only deadened part of one lot of the land, about one hundred and sixty acres, leaving between eighty and one hundred acres, which is sufficient for fencing the same hereafter; and that this clearing will increase the value of the remainder estate by \$500.00; and that he is amply able to respond in damages. Both deny all fraud and *mala fides*.

At the hearing, several witnesses were examined orally, and their evidence put in writing afterward by consent.

Said JONES introduced by complainant testified that he did not purchase said lot, for the purpose of erecting a saw mill; but a short time after he bought the life estate in the same he did propose to contract with one Fletcher, who owned a steam saw mill, situate in Albany, to remove it and put it in operation on said lot, and he intended sawing all timber on the lot suitable for sawing; that this timber was well suited for sawing; that he thought he had a right to do so; and that there was plenty of timber for the plantation besides that on his lot.

E. C. HELMES testified for complainants that if the said Jones' lot was wholly cleared, it would benefit the life estate and injure the remainder; that if he owned Dickinson's plantation, he would prefer the timber should be deadened and left standing rather than have it cut off; that this dead timber made the best of rails; that there was about three hundred acres of the river lands, and about five or six hundred acres of pine lands, and about seven hundred acres of cleared lands; that there was but little timber on the river lands suitable for rails; that the oaks on the river were generally good for rails, but that gum, ash, and other kinds of trees, (of which there were a great many,) were unfit for rails; that the pine lands were well timbered, and contained more rail-timber to the acre than the river lands; that the open lands had but little rail-timber on them, and the fences were in bad order.

I. JACKSON testified for complainants that he owns the



adjoining plantation to said Dickinson plantation, and is familiar with it ; that there are about five hundred acres of wood fit for rail timber ; that the wood on the river is unsuitable for rails ; that the Jones lot is embraced in that part which is fit for rail timber ; that on the old, or open lands, there is no timber of consequence fit for rails, and the fences are bad and need repairing. Cutting off the timber from the Jones lot would very greatly damage the remainder estate, and much greater than by only deadening the timber and leaving it standing ; that much of it would stand for twenty years, and being heart-pine, would make best of rails ; that in twenty years timber in that section will be of great consideration ; that cutting it all off of said lot would injure it ten dollars per acre ; that one half of the plantation is now cleared, and has but little rail-timber on it.

Defendant read the affidavit of E. C. Helmes, J. W. Reynolds, and J. M. Thornton, (complainant,) to the effect that they knew the Jones lot ; there was an abundance of timber or uncleared land on said estate, being about seven hundred acres cleared and nine hundred uncleared ; and if the whole Jones lot is cleared and the timber deadened and left on it, the value of the estate will be greatly enhanced, and if it is all taken off of said Jones lot the estate will be still more enhanced, because there is abundance of timber still left ; the cleared land near Albany rents high, and even pays good profits on investments, and clearing this Jones lot will enhance the value, by saving expense of clearing every spring, and by saving damage to crops by falling timbers.

JNO. R. HILL, by affidavit, stated that he was well acquainted with the plantation aforesaid, and with the Jones lot ; that in his opinion there will be sufficient timber on the same, (exclusive of the Jones lot,) together with what will be left on the Jones lot after cutting what is suitable for sawing, to fence the place for a number of years ; that if Jones clears the wood land and fences it well, the clearing will be worth for agricultural purposes fully as much as the timber for sawing would bring at present market prices ; that if, after fencing the same, Jones should cut off all the timber, it would

enhance the value of the remainder estate, by saving time in removing falling timber from year to year; and that when cleared said Jones lot will be worth more than it now is.

Upon this the Chancellor refused the injunction, and for this error is assigned.

WRIGHT and WARREN, solicitors for plaintiffs in error.

STROZIER and SMITH, solicitors for defendant in error.

HARRIS, J.

The refusal of the Circuit Judge to grant the injunction applied for by the remaindermen against the purchaser of the life-estate in the lands, to stay the waste being perpetrated by such tenant, as the destruction of the growing timber, clearing up the wood lands to put them in cultivation, &c., evinces the necessity of collecting and presenting old and familiar principles of the common law touching the respective estates in fee simple and life estates in lands, so as to remove the misapprehensions which so generally exist in the popular mind in reference to them.

An estate in fee simple is the *entire* and *absolute* property in the land; no person can have a greater estate or interest. The tenant or owner in fee simple is the *absolute* master of all the houses and other buildings erected on the land, as also of all wood growing thereon, turf, mines, &c.

A life estate is created by devise, deed, or operation of law. Thus a gift by deed or devise of a parent to a child of a lot of land during the life of such child, remainder to the child or children of such child, carves out a life estate for the child of donor or devisor. The remainder is an absolute estate in fee simple to the grandchild or grandchildren.

So, too, a life-estate is created by law where dower, or one-third of the land for life, is assigned to the widow. All estates for life, however created, are of the same duration, having the same rights, privileges, and incidents, and are subject to the same restrictions in their enjoyment.

Now the enquiry is, what does a tenant for life acquire—

or rather, what is the extent of his estate? He acquires the *usufruct* of the land, or in other words, the right of *using and enjoying the annual produce of the land during life, without doing damage to the absolute property in the remainderman.*

Ld. Coke in 1st Institute, 53, b, cited in 1st vol. Cruise Dig. Real property, p. 79,—lays it down as law, that tenant-for-life may cut timber trees, (that is, trees twenty years of age,) at seasonable times, for the repairing of the houses or fences on the land; but he cannot cut down timber to build new houses, or to repair those that he has himself improperly let fall into decay.

Even in this case, should he cut down more timber than is necessary for repairs, it is waste. Viner's Abridg't Waste.

Cutting of *dead* wood for his own use for fire wood, will not be regarded as waste; but the tenant-for-life will not be allowed to turn any wood into coal, as long as there is dead wood.

The right of tenant-for-life extends no further than to cut *dead* wood for fuel in the house, and of timber for the making and repairing of all instruments of husbandry, and for the repair of houses and fences. Coke Institutes, 1. 41. b.—2 Black. Com., 35—122.

He is not allowed to cut timber or to commit any other kind of waste.—Whitfield *vs.* Bewitt, 2d P. Wms 241; 2 Black. Com., 122, 281; 3 Black. Com., 224; Coke Litt. 53, a.

Timber is used technically to denote *green* wood of the age of twenty years or more, such as oak, ash, elm, beech, maple, and with us would include walnut, hickory, poplar, cypress, pine, gum and other forest trees.

*All timber belongs to the remainder man*, and the tenant for life has only a qualified property in it, and restricted to the uses before stated. See authorities quoted above.

The tenant-for-life cannot cut turf on bog lands for sale.—Co. Litt., 54, b.

He cannot dig for gravel or lime, clay, brick-earth, stone, or the like, unless for the reparation of the buildings or the manuring of the lands.

The changing of the course of husbandry, as by plowing up of an ancient meadow, was once held to be waste, but that has been altered. Can it be doubted, but that by bad and careless plowing, by which gullies are created and the surface soil swept away, thus impoverishing the land, the tenant-for-life would be held liable for waste, if the foregoing legal principles were pushed to their legitimate results?

So too the cutting down of shade trees around the homestead, or trees planted for ornament, or fruit trees, has been held to be waste.

The tenant-for-life will be held liable for damages, if when he enters into possession, he suffers houses or fences not in a ruinous condition, to go into ruin when they might easily be repaired.

Some of the foregoing restrictions as to use of timber and clearing up of land, have been held in New York, in the case of Jackson *vs.* Brown, 7 John Repts, 232, as inapplicable to this country. The answer to this case is, that these common law doctrines have not been altered by any legislative enactment, and are therefore obligatory on the Courts.

Such is the regard paid by the Courts to the protection of those having estates in remainder or reversion, that although the tenant-for-life holds by deed "without impeachment for waste by him," he will be permitted to cut timber only in a husband-like manner, nor will he be permitted to do a *permanent* injury to the inheritance. 1 Fonblanque Eq. 33, note; 1 Vesey 264; 6 Vesey 107; 1 John Ch. R. 11.

So jealous too was the common law as to the *abuse* of his estate by a life-tenant, that though it permitted him to sell or alien his whole estate or interest, or to create out of it a less estate than a life-estate, yet if he created an estate greater than that he held, and thus attempted to divest the estate in remainder or reversion, such conveyance operated as a forfeiture of his estate for life.

As to waste by the tenant-for-life, there existed at one time an idea that he was exempt from liability therefor, unless in his deed or title he was restrained by express words from committing it, growing out of some decisions to the effect

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*Dickinson et al. vs. Jones and Thornton et uxor.*

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that because the person creating a life estate could impose such terms on the tenant as he pleased, and none being imposed, the life-tenant was held not answerable for waste in the absence of such terms.

This led to the enactment of the Statute of Marlbridge, Henry 3d, chap. 24, by which the owners of the inheritance or in remainder or reversion, were entitled in all such cases, to maintain action against the life-tenant, and to recover full damages for the waste committed.

This statute being found inadequate to protect the estate in remainder or reversion, against the strong disposition of the tenant-for-life to go beyond his privileges, the Statute of Gloucester 6, Edward 1st, ch. 5, (see Schley Dig.,) increased the punishment, by declaring that the land injured should be recovered by the absolute owner, together with *treble* damages as an equivalent for the waste or injury done the estate. 2d Inst. 144, 299.

The Statute of Gloucester is incorporated in Schley's Digest as of force in Georgia.

Several notices of its provisions may be found in the earlier decisions of this Court, and *obiter* it is doubted whether treble damages can in this State be recovered for waste. Whenever I shall find that this statute has been repealed or altered by the Legislative power, it will be my duty to conform to its will; but until better informed, I must regard that statute as of force. Indeed no case could be presented stronger than the one in this record, demanding by every consideration of justice, for injury already done, such reparation as this statute provided.

Injunction ordered to be sanctioned.

JAMES ARCHER, plaintiff in error, vs. JOHN M. GREER, administrator of ROBERT CARVER, for use of D. H. WILCOX & Co., defendant in error.

NOTE. WARNER, C. J., did not preside in this case.

An agent of persons residing out of the county where the suit is pending, acting under a *del credere* commission, and to whom, or his order, defendant's note, sued on, is payable, under the Act of the 15th of December, 1866, is to be deemed as an original party to the contract, and as such is competent to testify.

Complaint. Evidence. Tried before Judge COLE. Macon Superior Court. March Term, 1867.

Plaintiff in error was sued by defendant in error on a promissory note for \$67.50, made 1st March, 1861, by said Archer, with D. A. Smith as security, payable to said deceased. The plea was failure of consideration. Upon the trial, after the note had been read in evidence, Archer proved by John M. Greer, that he was the administrator of said deceased, that deceased was the agent of D. H. Wilcox & Co., and as such agent, sold to Archer Phoenix guano, which was the consideration of said note.

Archer then offered to swear in his own behalf, that the article sold to him as guano was not guano, and was wholly worthless.

Objection was taken upon the ground that Carver, with whom he contracted, was dead.

The Court sustained the objection. Thereupon a verdict was taken against Archer.

He assigns error upon the rejection of his testimony.

HALL & FISH, attorneys for plaintiff in error.

W. H. ROBINSON, attorney for defendant in error.

HARRIS, J.

The bill of exception alleges error in the circuit Judge, in refusing to allow him (defendant below,) to become, on his

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own motion, a witness in his own behalf to support his plea of failure of consideration. Until the act of the Legislature of 1866, parties were not authorized to give testimony in their own behalf and by it only in certain circumstances. The question here is, could Archer be a witness as the case was situated. The facts are, that Carver, to whom the note was made payable, and of whom the purchase of the fertilizer was made, *is dead*,—that Greer, the plaintiff in the suit, is his administrator. In a case thus situated, the surviving party is not allowed to testify for himself. The fact drawn out by the examination of Greer, that Carver was the agent of Wilcox & Co. of Augusta, to sell the guano for them, cannot change the rule—as *Carver was an agent with a del-credere commission, and having taken the note payable to himself*, he should be deemed, in giving a fair interpretation to the act of 1866, as an original party to the contract and competent to have testified, had he been alive.

Judgment affirmed.

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MILES G. DOBBINS, plaintiff in error, vs. CHAS. L. DUPREE, defendant in error.

1. The verdict is against the weight of the evidence.
2. A judgment regularly entered up, upon an acknowledgment of service and confession of judgment by an attorney at law, is not void, but only voidable, and that upon clear and decisive proof that such attorney at law acted without any authority in the premises for the party (whom) he represented.
3. No warrant of attorney being required by the laws of this State or the practice of its Courts to entitle an attorney at law to appear for a party litigant, the strong presumption from his appearance is that he was authorized.

Motion to set aside Confession of Judgment. Decided by Judge SPEER. Spalding Superior Court, February Term, 1867.

Charles L. Dupree as security, and Leonard T. Doyal as

maker, were sued by plaintiff in error in said Court on notes amounting to \$3,180.00. Service was acknowledged 30th April, 1861, by "Doyal & Cook, defendants' attorneys," and at November Term, 1861, judgment was confessed against said defendants by Doyal & Cook.

At November Term, 1866, Dupree moved to set aside the said judgment, alleging that neither Doyal nor Cook nor Doyal and Cook were his attorneys or authorized to act for him as aforesaid, and that he had a defence, because said note was usurious. These allegations were denied, and for that and because Dupree (as was contended) was bound anyhow by the acts of said attorneys, Dobbins resisted said motion. At the trial, the Court held that the movant, Dupree, had the right to begin and conclude in said case, and attorneys for Dobbins excepted. Attorneys for Dupree read in evidence to the jury the original petition, with the entries thereon, as aforesaid.

They then examined as a witness said L. T. DOYAL, who testified that he was in the army when the acknowledgment and confession were made, that they were in the hand-writing of V. C. Cook; witness had told Cook to acknowledge service for him on any suit which might be brought against him, but witness had no authority to authorize him to do so for Dupree, and was not Dupree's attorney in this case. Cook was a young lawyer, having no visible means, unfamiliar with the rules of practice, authorized to use witness' name in the firm, though witness did not regard it as a partnership except to that extent.

At the date of the confession witness was in Virginia; there was a statute continuing causes when counsel was in the army. Witness knew of this judgment in June or the fall of 1862; Dupree knew in February or March, 1866, of this execution, (not of the Neal *fi. fa.*) The lands of Dupree have been sold the last time long enough to have made a crop.

CHARLES L. DUPREE, in his own behalf, swore that he did not give Cook or any one else authority to make said acknowledgment or said confession; that when the confession



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was taken he and his family were sick, and one of his children a corpse in the house; that he never knew of this judgment till March (then) last; that at the date of the judgment he had a good property; that Cook has nothing; that Cook was frequently in his house, familiar with him—had written some deeds for him, but had never been authorized to confess judgment in any case against him; that Sloan & Oatman never sued witness, so far as he knew; that Cook never attended to his business for him; the case of Oatman is still unsettled—that he had paid part of the money on it, and that Doyal & Cook were not employed by him to defend that case.

He further swore that Dobbins said, before suit, that he wanted Doyal to pay him; Dobbins never said to witness that it was best that suit be brought, nor did witness tell Dobbins to sue, nor did Dobbins tell witness he was going to sue. Witness said, in 1864, I told Dobbins I was secured by a mortgage on Doyal's negroes. Dobbins told me he would not take Confederate money now (then).

Movant closed.

DOBBINS swore in his own behalf: I saw Dupree before suing, and told him I thought it best to sue; that I did not wish to sue Doyal, that Doyal was in debt. At last Dupree said it was best to sue. The note belonged to some orphans. I told Dupree in 1863 I would take Confederate money; I refused to take it in 1864 or 1865. I knew nothing of Cook's acknowledging service; how much of the note is usury, I know not—I think I charged him sixteen per cent. for the money; I think the interest was added in the small note; I think I took sixteen per cent. off the large note.

Doyal was in the war when I spoke to Dupree of suing; he seemed unwilling to be sued—I left it to him, and told him as Doyal was in the war, and embarrassed, it was best for him (Dupree) that I should sue. In 1863 I told him I could use Confederate money in settling with the guardian.

DUPREE was re-introduced, and the writ in Sloan & Oatman case was handed him. He admitted then that he was served in said case; he stated that Doyal was in Spalding

county in 1860, that he had paid one hundred dollars on the Sloan & Oatman case since the judgment, that he knew nothing of any defence in that case, and that he never gave Cook authority to confess judgment in that case.

A. D. NUNNALLY swore, that he did not know whether Dupree was at the Court when the confession was taken. Sloan & Oatman's case was defended, and Dupree knew of the suit. Witness' recollection is, that at one time, when said (S. & O.) case was pending, Dupree was in the court-house and Doyal & Cook were defending him; don't recollect when it was, nor how long the case was pending, but witness feared he would not get a judgment.

L. T. DOYAL re-introduced, swore: That Cook had no authority to represent the case of Sloan & Oatman. Witness represented Dupree, and plead failure of contract. Cook had no authority to represent witness in any litigation in which Doyal & Campbell were interested. Dupree frequently consulted witness while he and Cook were partners. Dupree and Cook were intimate, and Cook frequently at Dupree's house. Cook had authority to acknowledge service for me, (to save my wife from mortification,) but no authority to confess judgment.

Attorneys for Dobbins introduced and read in evidence the Sloan & Oatman case aforesaid. It was an action against Dupree, as trustee, for the price of certain marble tombstones, brought by Nunnally & Dismuke, as plaintiff's attorneys, to February Term, 1860, of Spalding Inferior Court, which had been personally served on Dupree, to which Doyal & Campbell had plead, and on which a confession was made at February Term, 1861, signed "Doyal & Cook, attorneys for defendants."

They also read the answers of VIRGIL C. COOK to interrogatories, in substance as follows: During 1861 and 1862 I resided in Griffin, Georgia, and was practicing law with L. T. Doyal. I understood that I was to represent Doyal in all cases in which he was concerned, and in all suits that might be brought against him. During those years Doyal and myself were the acting attorneys of Dupree; I knew of no

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others. I do not distinctly recollect the Dobbins suit, but if I acknowledged service, it was with the understanding that I was authorized to do so by Dupree. I never acknowledged service and confessed judgment without authority, I think; if I did, I thought I had authority. I don't know why Dobbins' suit was brought.

His answers to the cross-interrogatories were substantially as follows: I have no distinct recollection about the Dobbins case; I had no written authority to acknowledge or confess for Dupree. I understood I had authority to acknowledge and confess for Doyal in any case brought against him. I don't think I ever acknowledged service for any one, as a favor, without authority, and don't think I ever saw other attorneys do so. At that time, Doyal and Dupree each had considerable property, I don't know how much, but I don't know what were their liabilities.

After the evidence had closed and argument was had, the Court charged the jury, among other things, that Dupree's mere standing by after knowledge of the judgment, and taking no steps to set it aside for a few months, was not such an acquiescence or ratification as would bind him.

The Court was requested to charge that if the attorney acted without authority in acknowledging service and confessing judgment for the defendant, then the judgment would be sustained in law, but the defendant would be let in to make any legal defence he might have, and the Court would open the case for that purpose and stay all proceedings.

The Court refused so to charge, but charged the jury that if they believed from the evidence that neither Doyal nor Cook were authorized by Dupree to acknowledge service and confess judgment for him in this case, then they must find that the judgment is void.

The verdict was: "We, the jury, find for Charles L. Dupree, and set aside the judgment as void."

A new trial was moved for, upon the grounds—

1st. Because the verdict was contrary to the evidence and the weight of the evidence and to the charge of the Court.

2d. Because the Court erred in charging as aforesaid as to acquiescence or ratification. .

3d. Because the Court erred in refusing to charge as requested.

4th. Because the Court erred in charging that if the jury believed neither Doyal nor Cook was authorized to make the confession, the judgment must be set aside ; and,

5th. Because the Court erred in holding that attorneys for Dobbins had not the right to begin and conclude the argument.

The motion was overruled by the Court, and this is assigned as error.

BOYNTON & DISMUKE, Q. A. ALFORD, WM. DOUGHERTY, attorneys for plaintiff in error.

PEEPLER & STEWART, attorneys for defendant in error.

HARRIS, J.

A question of practice under the rules of the Superior Courts is made by the bill of exceptions, which we do not find it necessary to decide now. Of this question so made, that is as to which party in this case belonged the right to open and conclude the argument, it may not be inappropriate, however, to say that it could only have arisen in this case from the form pursued by the petitioner below, in calling on the other party to *show cause* why the judgment in favor of that party against the petitioner should not be vacated and set aside for want of legal service, etc. If strict rule had been adhered to, it would have been difficult to deny to the party called on to show cause the opening and conclusion, indeed from responding to the call ; but looking to the end sought to be attained, and thinking that the proceeding to accomplish the purpose of petitioner should have been a simple motion setting forth the grounds upon which the Court was asked to vacate the judgment, accompanied by notice in writing thereof to the opposite party, it is believed that as to the right of the movant, on a motion so framed

and addressed to the Court, that there could not have been a doubt that the *onus* was on him, to open and conclude. If this question should again arise, we will then consider it carefully, and by a decision endeavor to settle a matter made embarrassing most always by the form adopted.

1. The verdict on the issue made upon the petition of Dupree is alleged to be contrary to and against the weight of evidence. We are of that opinion. There is no testimony positive or circumstantial denying the authority of Cook, the attorney at law, to acknowledge service of the declaration against Doyal principal and Dupree security for Dupree, or to confess judgment for him, except the testimony of Dupree himself. Nor can we infer from any fact in the case the slightest thing corroborative of his denial of having given authority to Cook to represent him.

The testimony of Dupree as to occurrences before suit brought, is contradicted by Dobbins, who seems to have no personal interest in the judgment, (it being founded on a note due to some orphans,) and whose credibility, therefore, cannot be affected by interest.

As to the authority to acknowledge service of the writ and to confess judgment, Cook asserts that during the years 1861 and 1862 (it was in April, 1861, service was acknowledged, and judgment confessed in November, 1862), Doyal & Cook were the sole attorneys at law of Dupree—that the acknowledgment of service by him was with the understanding that he was authorized to make it by Dupree; that he never acknowledged service or confessed judgment, he thinks, without authority; does not think that he ever acknowledged service for any one as a favor without authority, and don't think he ever saw other attorneys do so. Now this is fully as definite as the testimony of Dupree, but when taken in connexion with Dobbins', as also the suit in the case of Sloan and Oatman, which was vigorously defended according to Colonel Nunnally's recollection, and confession of judgment by Doyal & Cook in that case during the February term just before the acknowledgment of service of the writ in favor of Dobbins: it is difficult, indeed impossible, to avoid a strong con-

viction that Cook had authority to acknowledge service for Dupree, as he clearly had for Doyal, his partner, absent in military service. Dupree, secured by mortgage from Doyal, was probably in consequence thereof careless; the testimony shows his memory to be at fault in several particulars, which detract from his weight and adds force to the representations of Cook. Nor is the fact that Doyal, the principal debtor—and in the army, too—knew of this judgment some time in 1862, whilst Dupree, at home in the country, does not hear of it until February, 1866, without significance. It seems passing strange that a security with a mortgage on negroes, his principal being embarrassed in his circumstances, should sit still, not a word uttered by him, not an enquiry made as to the note on which he was a security, and the negroes made free as early as May, 1865, and he hears nothing of the judgment against him till February, 1866. We find nothing in the facts contained in the record, nor do we see the slightest thing in the conduct of Dupree to entitle him to have the judgment against him set aside as void.

2. A more dangerous doctrine to the interests of society we cannot well conceive than that insisted on, viz: that a judgment regularly entered up, upon an acknowledgment of service of the writ and confession by an attorney at law, can be set aside and declared void upon the mere unsupported testimony of the party against whom the judgment is rendered.

Judgments thus rendered, and which have gone to record, should not be vacated but upon *the clearest and most decisive proof* that an attorney at law acted without any authority whatever in the case from the party he represented.

3. Again, there is another view, which has had great influence in conducting us to the conclusions we have arrived. It is a well known fact, that for forty years past, neither the laws of the State nor the rules of Court required what was previously customary—the production and filing in the Clerk's office of a written warrant or authority to an attorney at law, to enable him to appear and represent a party litigant. From this alteration in practice, the Courts have necessarily

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Dobbins vs. Dupree.

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acted upon the presumption that every attorney at law representing a party was duly authorized; and this presumption derives great strength from the statutory provision for the punishment of any one representing him as an attorney at law in the course of a suit or proceeding in Court, whereby the party so represented suffered loss or injury, when such attorney at law was not authorized.

Besides this criminal liability, there exists a civil liability to damages against any unauthorized attorney at law for any loss or injury occasioned by his representation of a person who gave him no authority. By the Code, another safeguard has been provided for parties litigant: that is, by punishing as for a contempt the attorney at law who represents a party without authority, in a fine not less than \$500.00.

In awarding a new trial, it seems but just and equitable that Mr. Dobbins should remit in writing on the judgment and execution the full amount of usurious interest which he admits in his testimony infects the note or notes on which the judgment is founded; that is to say, all interest over and above seven per cent.

Judgment reversed and new trial ordered.

Lowe, Camp, et al. vs. Craig—Lowe, Garmany, et al. vs. Craig.

JESSE LOWE, ROBERT B. CAMP *et al.* plaintiffs in error, *vs.*  
ROBERT CRAIG, defendant.

JESSE LOWE, JAMES GARMANY, *et al.*, plaintiffs in error,  
*vs.* GEORGE W. F. CRAIG, defendant.

NOTE. WARNER, C. J., did not preside in this case.

Plaintiffs in error and others purchased from Craig a *fi. fa.* against the Lawrenceville Manufacturing Company, in which they were stockholders, and gave therefor their joint note. One of the makers of the note by importuning Craig, procured the substitution of another promisor in his place. Suit was brought on the note, and the plea was *non est factum*, (by reason of the alteration.) Equity will, under these circumstances, compel the withdrawal of that defense or the payment on the note, of so much of the proceeds or money collected by defendants on the *fi. fa.* by the sale of said Company's property, as will, together with what plaintiff (Craig) had otherwise collected, pay off the note.

Debt. Recovery on original consideration of altered notes.  
Tried before Judge HUTCHINS. Gwinnett Superior Court.  
September Term, 1866.

By consent of counsel these two cases were consolidated and argued together. They are reported as if they had been tried together in the Court below.

Robert Craig was the owner of a *fi. fa.* in his favor against the Lawrenceville Manufacturing Company, (a corporation,) on which there was due, on the 4th November, 1856, \$3,109 89½; and George W. F. Craig was the owner of a *fi. fa.* in his favor against said Company, on which there was due at said date, \$1,661 09.

They were about proceeding to make their money out of the effects of said Company, which were ample for that purpose.

Jesse Lowe, James Garmany, Richard Whitworth, John Bankston, Robert B. Camp, Merit Camp, R. D. Winn, John T. Smith, John Mills and James P. Simmons, who were stockholders in said Company, in order to prevent a sale of said effects, took to themselves transfers of said *fi. fas.*, and in consideration thereof, delivered to said plaintiffs in *fi. fa.* res-



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Lowe, Camp, *et al.* vs. Craig—Lowe, Garmany, *et al.* vs. Craig.

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pectively, their joint promissory notes for the said amounts due them respectively. The notes were dated the day aforesaid, payable to said Robert Craig and George W. F. Craig respectively, or bearer, and due the 25th December, 1857, with interest from date. Afterwards R. D. Winn sold his stock in said corporation to H. R. Williams, and Williams agreed to take Winn's place on said notes. The said payees suffered said Winn to erase his name, and said Williams to sign his to each of said notes.

In February, 1858, said payees, each in his own name, sued on his note, all of said parties except said Winn, (and said Whitworth, who was alleged to be dead.) The notes were declared on as altered as aforesaid.

The defendants (except Williams) plead the general issue, and that they were all released by reason of the release of said Winn, and also plead a special *non est factum* founded upon said alteration. This plea was verified by John Bankston, John T. Smith, Jesse Lowe, Merit Camp and Robert B. Camp only.

Plaintiffs amended their declarations as follows:—Robert Craig set out the said agreement and transfer of his *fi. fa.*, and averred that said defendants agreed to pay him therefor \$3,109 89. George W. F. Craig set out his transfer, averred that said defendants had collected on his said *fi. fa.*, \$710 12 to his use, and therefore owed him that sum.

The cases were carried to the appeal by consent.

Pending the appeal, each of said plaintiffs filed his bill in equity against said defendants, charging that the foregoing facts were true; that said Williams and said Company had each become insolvent since said Williams signed said notes; that said other defendants knew that said alterations in said notes were about to be made and urged no objection thereto, consented to it at the time, and after the alterations were made, acquiesced in the same; and that they subsequently ratified it by taking their portion of money arising from the sale of the effects of said Company, sold under other *fi. fas.*, and applying it to the payment in part, of said transferred *fi. fas.* George W. F. charging that said defendants so collected

on the *fi. fa.* which he had transferred, \$1,000.00, or other large sum; and Robert Craig charging that they so collected on the *fi. fa.* transferred by him, \$2,000.00, or other large sum.

The said complainants further charged, that said Williams had, on the 8th February, 1858, given to each of them a mortgage on his (Williams') individual property, to secure the payment of said notes; that said mortgages had been duly foreclosed, the mortgaged property sold under the mortgage *fi. fas.* and the proceeds, \$3,461.00, had been paid to said plaintiffs *pro rata*,—said Robert getting \$2,255.80, and said George W. F. Craig getting the balance; and thus Williams had been compelled to pay more than his share of said notes.

The bills prayed discovery etc., and, lest said cases should be lost by the strict rules of the common law, they prayed that the same be restrained, that defendants answer said bills, and have these matters fully settled according to equity.

Demurrers were filed, the ground being that plaintiffs had redress at common law; but no ruling seems to have been had thereon. It was agreed between the parties that James P. Simmons should not answer the bills, but that either party might examine him as a witness.

The other defendants answered. They denied having known that said alterations were about to be made, denied having known or consented to them at the time, or having acquiesced in or ratified them. They admitted all the other facts alleged in the bills, except the charge as to their having received money on said transferred *fi. fas.* As to that, they said that they did not attempt to enforce said *fi. fas.* but were informed and believed that James P. Simmons, after the Company's effects had been sold by the sheriff on other *fi. fas.* by virtue of an order for distribution of the proceeds, received \$1,317.28 thereof, and that said Simmons with their approval, paid out on notes held by Alfred Williams and William Nesbit on the same parties, (except that said Winn did not sign said Williams' note,) all of said money, except the part thereof claimed by said Hiram R. Williams, for which Simmons

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Lowe, Camp *et al.* vs. Craig—Lowe, Garmany *et al.* vs. Craig.

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was garnisheed by other creditors of said Williams. They, by way of cross bill, set up that said complainants had received money and securities from which money had been or would be collected, and prayed for a discovery of the same, and that said sums be credited on said complainants' said notes. They prayed judgment for costs.

GEORGE W. F. CRAIG to said cross bill answered, that on 1st February, 1858, he received on his said mortgage *fi. fa.*, \$1,205.58, and that in September, 1858, said James P. Simmons bound himself to pay him "one-eighth part of the note sued on, whether the case shall result for plaintiff or defendants;" that Simmons had paid nothing on said bond, and that he had no other money, nor securities on which money was collectable, connected with said transaction.

ROBERT CRAIG made the same answer, except that the amount received by him was \$2,250.80, as aforesaid.

R. B. Camp, John T. Smith and James Garmany having died and *sci. fa.* having been served upon the legal representatives of each, an order was taken in the case of Robert Craig, at March Term, 1866, making Merit Camp, as administrator of R. B. Camp, and William B. Smith, as administrator of John T. Smith, parties defendant; and at September Term, 1866, they (and also Mary C. Garmany, as administratrix of James Garmany,) were made parties defendant in the case of George W. F. Craig.

At September Term, 1866, the common law cases and the equity cases were submitted to the jury together.

Before going to trial, counsel for the defendant objected to trying said cases without the legal representative of James Garmany being made a party. The Court overruled this objection. The pleadings being read, said plaintiffs offered as evidence their said promissory notes. Their introduction was objected to because of said alteration and erasure. The Court overruled the objection, and the notes were read to the jury. Attorneys for George W. F. Craig read in evidence an order of the Inferior Court, passed 16th December, 1857, ordering the Sheriff to distribute *pro rata* between certain *fi. fas.*, (including said transferred *fi. fas.*), the money raised

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Lowe, Camp *et al.* vs. Craig—Lowe, Garmany *et al.* vs. Craig.

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on a *fi. fa.* of Wiley W. Webb vs. Lawrenceville Manufacturing Company, and read in evidence the original *fi. fa.* of George W. F. Craig against said Lawrenceville Manufacturing Company, for \$1,575.44 principal, \$64.33 interest, and \$6.00 cost, judgment 15th September, 1856, with a transfer from the plaintiff to said defendants (in this action) dated 4th March, 1856.

They then swore RICHARD D. WINN, who testified all the facts aforesaid as to the alteration and erasure and transfer of the *fi. fa.*; that Williams was at that time (of erasure, etc.,) worth as much as was witness, if not more; that in making said alteration he did not, nor did Craig or Williams, so far as he knew, intend fraud against any one.

On cross-examination, he stated that none of the other makers of the note were present at the alteration, nor had any knowledge that it was contemplated, so far as he knew; nor was any of them guilty of fraud within his knowledge or belief; that it is generally believed that H. R. Williams is insolvent; that the note was given for the *fi. fa.* and in payment for it, and the *fi. fa.* was controlled (to them) without recourse, but nothing was said between the parties about the note being received in payment or otherwise.

Here complainant George W. F. Craig closed.

#### ROBERT CRAIG'S CASE RESUMED.

Robert Craig's attorneys also examined said WINN, who testified as in the other case, and also said that he and complainant and Williams went to James P. Simmons' office to arrange the papers, (after the agreement for alteration was made,) and the erasure was then made, and Williams then signed the notes, and witness transferred his interest in the *fi. fas.* to Williams. Simmons was not sitting in the office, but witness thinks he passed through it while they were there. Witness asked Simmons to write said transfer, which he declined doing, seeming to be in a hurry. Witness does not know whether Simmons knew what was going on, nor whether any of the other defendants knew that it was to be

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Lowe, Camp *et al.* vs. Craig—Lowe, Garmany *et al.* vs. Craig.

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done. There were about forty stockholders in said company when the note was made.

HIRAM R. WILLIAMS was then offered as a witness, and objected to by defendants on account of interest.

The objection was overruled. He testified substantially the same as Winn had testified, and that he never said anything to defendants about the alteration before it was made; and if he did say anything to them about it, it was after the sale of the property, and that he got none of the money raised on the *fi. fa.*

They then examined JAMES P. SIMMONS, who testified that he was not present when the note was altered, that Winn had told him of his arrangement with Williams, and he told Winn that such alteration would avoid the note, and refused to consent to it. Witness seeing Winn and Williams coming to his office, left, because suspecting their object, "he did not want to offend Winn by objecting to it, nor did he wish to increase his liability by consenting to it." Winn asked him to write the transfer, and he refused. Witness thinks that none of the makers of the note knew of the alteration at the time, but he believes that all knew it before the distribution of the money under the order aforesaid. The amount received on the *fi. fa.* given for this note was \$1,317.28, and was paid out except as before stated (in the answer) to other notes given for other *fi. fas.* against the company: that after witness knew of the alteration, he told plaintiff he might have trouble with it and had better arrange it, that he had given his obligation for one-eighth, (claiming no advantage.) He thought this his duty—but the other defendants were under no such obligations, and he now had no interest in this suit. Garmany failed with the company, and died insolvent.

They then introduced the original *fi. fa.* in favor of Robert Craig vs. Lawrenceville Manufacturing Company, for principal \$2,578.31½, interest \$499.23, cost \$6.00, judgment 15th September, 1856, with the transfer as aforesaid on 4th March, 1856.

The plaintiffs closed.

The defendants introduced no evidence in either case.

After argument, the Court charged the jury, among other things, substantially as follows: If you believe from the evidence that the plaintiffs, without the knowledge or consent of defendants, altered the notes, by erasing the name of Winn and allowing Williams to sign in his stead, with intent to injure or defraud the defendants, then plaintiffs cannot recover either on the notes or original considerations, at law or in equity, both being extinguished by plaintiffs' unlawful acts. But if you believe from the evidence that the alteration was made with no intention to defraud or injure the defendants, was an honest mistake of law and facts and did not injure the defendants, while the note is admitted to be void, the plaintiffs would be entitled to recover on the original considerations: *provided*, the evidence warrants such recovery. The Court read to the jury Section 2793 of the Code of Georgia.

The jury found a verdict for \$1,341.48 principal, with interest from the 1st February, 1859, and costs of suit, for Robert Craig, and a verdict for \$710.12, with interest from 17th December, 1859, and costs of suit, for George W. F. Craig.

Defendants moved for new trial on the following grounds:

Because the Court erred, 1st. In permitting the cases to be tried without making the legal representative of James Garmany a party.

2d. In allowing the notes read to the jury.

3d. In admitting the evidence of H. R. Williams.

4th. In reading to the jury Section 2793 of the Code, without explaining to them that the notes, having been altered by plaintiffs by the release of one of the makers and the addition of another party, if done without the consent of the other joint makers to it, were thereby rendered void, and therefore the contract is not "capable of execution."

5th. Because the verdict is contrary to the law, to the evidence and the charge of the Court as given, and without evidence to support it in this, that the release of Winn and addition of Williams rendered the note void, and released the

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Lowe, Camp *et al.* vs. Craig—Lowe, Garmany *et al.* vs. Craig.

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other makers, because the notes having been given in lieu of and in payment for the *fi. fas.*, and so altered without consent of defendants, plaintiffs cannot recover the original consideration paid for the notes, because a Court of Equity, in the absence of fraud on the part of these defendants, cannot give these plaintiffs any relief from the legal effect of said release, because under the verdicts plaintiffs have recovered and will receive a large amount more than is due on the notes sued on, (even if the notes are good and valid,) and because the jury did not find, decree and settle the equities of the several parties before the Court, as should have been done.

The Judge certifies that plaintiffs admitted that the notes were void, and offered to, and he thinks did, release any excess over the true amounts due.

The motion for new trial was overruled.

The bill of exceptions assigns for error the overruling of said motion, reiterating each of the grounds taken therein.

SIMMONS & WINN, J. N. GLENN, attorneys and solicitors for plaintiffs in error.

WM. H. HULL, T. M. PEEPLES, GEORGE HILLYER, N. L. HUTCHINS, Jr., attorneys and solicitors for defendants.

HARRIS, J.

Many points appear to have been raised and decided in the Court below. We deem it unnecessary to consider anything, as the matters in controversy were at length drawn into a Court of Equity, but the ground upon which so manifestly the cases should be decided in that forum. The record discloses the fact that plaintiffs in error and another purchased of the Craigs their executions against the Lawrenceville Manufacturing Company, the plaintiffs being stockholders, and gave their joint notes for the respective purchases. Afterwards, one of the stockholders and makers of said notes (Winn,) prevailed on the Craigs by importunity to allow him (Winn) to substitute in his place on the notes another promis-

sor, and Williams was thus substituted. When the notes became due, the Craigs commenced suit—the plaintiffs were met by pleas of *non est factum* filed by said stockholders, the pleas alleging the alteration of the notes by the erasure of the name of Winn and substitution of Williams, as a bar to plaintiffs' recovery. The cases having been placed on the appeal, the Craigs filed their bill for discovery and relief, in which the whole transactions were set forth, and in which they prayed that the defendants below be decreed either to withdraw their pleas of *non est factum*, or that they should pay over to plaintiffs, to be credited on the notes sued on, so much of the proceeds or money collected or received by the stockholders on the executions which they had purchased and which had been raised from the sale of the property of the Manufacturing Company, as with the amounts the Craigs had collected on their mortgage *fi. fas.* against Williams, would, together, pay off and extinguish the notes sued on. These bills were rightly instituted; and, especially as it is by no means sure whether the complainants could have had full relief at law, notwithstanding the almost entire obliteration under our Code of the functions and powers of Courts of Law and Equity as separate jurisdictions. The equity of the Craigs to the relief prayed is so clear, that the surprise is that for a moment it should have been resisted.

Judgment affirmed.



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Mordecai vs. Stewart.

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BENJAMIN MORDECAI, plaintiff in error, vs. JAMES STEWART, defendant in error.

NOTE. WARNER, C. J. did not preside in this case.

Where parties made an agreement by which one pays and the other receives a certain amount, which is entered as a credit on a promissory note, the note is extinguished *pro tanto*, and the remainder due upon the note, stands unaffected by the entry of the credit. The amount thus credited cannot be enlarged, in the absence of any agreement of the parties so as to extinguish a greater nominal amount of the note than the amount named in the credit.

Foreclosure of Mortgage. Scaling ordinance. Motion to dismiss Bill of exceptions. Tried before Judge VASON. Sumter Superior Court. December adjourned Term, 1866.

BENJAMIN MORDECAI filed his petition against James Stewart for a foreclosure of a mortgage, which was a conditional conveyance of certain lots in Americus in said county, and given only to secure the payment of a certain promissory note for \$44,000, dated 8th January, 1863, and due twelve months after its date, with interest from date, made by said Stewart, payable to the order of A. S. Cutts, and endorsed by Cutts to plaintiff.

The rule *nisi* was issued and duly served. At October adjourned term, 1866, defendant by his attorneys H. K. McCay and W. A. Hawkins, plead that this was a contract within the (scaling) ordinance, and prayed a verdict accordingly.

At said term the case came on to be tried.

Plaintiff moved to continue the case upon the following showing by James J. Scarborough, one of his attorneys. He stated that at the regular October term, 1866, the case was called by Judge Speer then presiding; that not knowing there was any defence, he took a rule absolute for foreclosure, and Judge Speer struck the case from the docket; afterwards and during the term, H. K. McCay, Esq., an attorney of the Court, announced that W. A. Hawkins, who was absent from the Court by leave of the Court, had been employed as attorney for the defence; said rule absolute not having been

spread upon the minutes, plaintiff's attorney withdrew the order absolute; he had not been notified that there was any defence to said case, and had not prepared his case for trial, as he had considered the case had been continued for the term; that the plaintiff lived in Charleston, South Carolina, and they were not ready for trial, because they needed plaintiff there.

The Court refused to continue the case, and plaintiff excepted and assigns said refusal as error.

A jury having been empaneled, the plaintiff read in evidence his said mortgage and note. The note had endorsed on it, a credit of \$15,325, dated 17th March, 1866.

Plaintiff closed.

The defendant offered in evidence the following letter. Plaintiff's attorneys admitted that it was written by plaintiff, but objected to its being read. The Court overruled the objection.

BANK OF THE STATE OF SOUTH CAROLINA,  
*Columbia, December, 1862.*

A. S. CUTTS, Esq., Americus, Ga.,

*Dear Sir* :—Your favor of 16th inst. received. I will accept the proposition made me, viz: that Mr. Stewart will give me a mortgage upon the property proposed, provided it is worth the amount he proposes to secure me for, and that it is covered by insurance and said policy assigned. Should I have occasion to sell property to reimburse myself, and it falls short of the amount of his indebtedness, I shall of course expect to hold him for the balance. I understand this to be his proposition.

The balance of (\$50,000) fifty thousand dollars, I shall be willing to take the titles of the Georgia and Pensacola Railroad for fifty thousand acres of land, as stated in your letter. This I understand to be your meaning, which gives me pleasure to comply with—with this understanding, I will be with you the first week in January next. I cannot be with you before. If in the meantime, you make sales of any of the land, you can account to me when I see you. When I leave

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here, I will deposit the bonds with the South-Western Railroad Bank, subject to my order, in favor of Houston Pt. Write me if this is our understanding.

Your obedient servant,

B. MORDECAI.

The defendant then introduced said A. S. Cutts, "who was the alleged meritorious defendant." Plaintiff objected to him on the ground that he was incompetent. "Defendant deposited costs, and the Court allowed him (Cutts) to testify, not as a party, but upon a release of and depositing the cost."

He testified that the \$44,000 note and mortgage were given for Pensacola Railroad bonds, (and identified a bill of particulars or sale, hereinafter set forth,) and that said bonds were at the time, selling in Confederate money at eighty cents in the dollar. These bonds had been sold by witness to Mordecai at seventy cents in the dollar before the war, and witness had been paid for them by Mordecai at this rate. By getting these bonds from Mordecai, witness obtained possession of fifty thousand acres of Florida lands, then and now worth two dollars and a half per acre, though witness insists he had a legal claim to these lands, and as he believes, could have compelled the Company to give him possession of them, if he had had time to do so.

A payment was made of \$15,325 in Florida lands, at two dollars and a half per acre, about the value of said lands. Twelve thousand, six hundred and nineteen (12,619) acres of said land being at said rate, paid partly on some other claims of Mordecai.

The transaction was a Confederate one, made at the time it purports to be, on the bill of particulars. The twelve thousand and odd dollars were paid in Confederate money. The \$50,000 were soon thereafter paid in Confederate money, as is stated in the bill of particulars. The land before the war, was worth \$2.50 per acre in good money. The land was no part of this purchase. He bought the bonds to avoid litigation with the Railroad Company about the lands, as he was in the war and embarrassed at home, and could not attend to a settlement with the Railroad Company.

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The other claims of plaintiff, on which payment was made at the time of credit on the note, were not connected with this claim. Fifteen thousand, three hundred and twenty-five dollars' worth of said Florida lands, was paid on this note. These were the lands the possession of which was obtained as above stated.

The reason why witness did not before make any resistance to the payment of this debt and the other debts, in which he claims there was usury, is because he was in the army and embarrassed at home, and would have done anything, not involving principle, to save Mr. Stewart, his friend, and prevent litigation. The consideration of the note was as stated, Georgia and Pensacola Railroad bonds.

The defendant then identified the following paper as the original bill of sale, and offered the same in evidence.

It was objected to by plaintiff, and the objection was overruled by the Court.

COL. A. S. CUTTS,

Bought of B. MORDECAI.

1863, January 6.

To 220 Ga. & Pensacola (220) R. R. Bonds, }	\$88000 00
\$500 each @ 80c.	
" 220 Coupons payable 1st July, 1861, \$20.....	4400 00
" Interest on same to 6th January, 1863,.....	357 56
" 220 Coupons, payable 1st July, 1862, \$20 each,	4400 00
" Interest on same to 6th January, 1863,.....	181 86
" 220 Coupons, payable 1st Jan., 1863, each \$20,	4400 00
" Interest to 6th January, 1863,.....	587 00
	<hr/>
	\$106679 19
Deduct Cash,.....	12679 19
	<hr/>
	\$ 94000 00
Mortgage,.....	44000 00
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	\$50000 00

Here defendant closed.

Plaintiff, in rebuttal, introduced as a witness, CHARLES W. CHARLTON, who testified that in September (then) last he

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proposed to purchase from defendant the hotel lot and building covered by said mortgage; that defendant refused to sell, or to agree to sell, until Col. Cutts had agreed to advance \$7,000 to Stewart in place of \$7,000 to be paid to Mordecai to release the mortgage on said hotel and lot. The parties, CHARLTON, STEWART and CUTTS, requested C. T. GOODE, Esq., attorney for MORDECAI, to write to him and get authority to release the mortgage on said hotel, on payment of \$7,000 and a mortgage on one thousand acres of Missouri land, (its estimated market value,) which was done. The parties calculated with Colonel GOODE, the market value of the other property embraced in the mortgage, and all the parties came to the satisfactory conclusion that there would be just about enough property to pay the amount of the mortgage. Colonel Cutts agreed to reimburse Stewart for \$7,000 purchase money which was to go to Mordecai, in case he could not arrange with Mordecai; but the extent of the understanding on the part of Cutts, was merely to release the property from the encumbrance of the mortgage in some way.

Plaintiff then identified the agreement alluded to by Charlton, and read the same in evidence as follows:

GEORGIA, SUMTER COUNTY,

Be it remembered, that it is hereby agreed and covenanted between James Stewart and Charles W. Charlton, of said County, that said Charles W. Charlton is to pay to said Stewart \$7,000 on the first of January next, if practicable for him to do so, and at all events by the first day of March next; and also to convey to said James Stewart good and sufficient titles to one thousand acres of land in the County of Dunkirk in the State of Missouri, near the county site, Kennett; and the said James Stewart, in consideration of the payment of said sum of money and the conveyance of said land, hereby obligates himself to make good and sufficient titles to said Charles W. Charlton, conveying to him free and unencumbered, the town property known as Stewart's Hotel, now occupied by W. D. Stewart, together with the lot upon which the Hotel is constructed, said title to cover both the lot and

the building. It is understood between the contracting parties, that in case the hotel building should be injured or destroyed by fire before said Charlton receives possession, (which he is to have by the 1st January next,) then so much of this instrument as relates to the conveyance of the hotel building and said Missouri land, is to be void,—it being the intention of the parties, that the Missouri land shall pay for the hotel building.

JAMES STEWART. [SEAL.]

*per* W. D. STEWART.

C. W. CHARLTON. [SEAL.]

Signed, sealed and delivered in presence of us, this 20th September, 1866.

ALEXANDER KING,

F. M. COKER, *Notary Public.*

Plaintiff also read the endorsement on said instrument as follows: "In accordance with instructions from Mr. Benjamin Mordecai, who holds a mortgage on the hotel lot and building within described, we hereby, as his attorneys, agree to release the mortgage upon the payment to us of \$7,000 between the first of January or the first of March next, and a receipt of a mortgage upon one thousand acres of Missouri lands, this 20th September, 1866.

SCARBOROUGH & GOODE,

*Attorneys for B. Mordecai.*

Plaintiff then examined as a witness, MATTHEW R. STANSELL, who testified that in December, 1862, and January, 1863, corn was selling in Confederate money from \$1.00 to \$1.50 per bushel, and bacon from 18 to 22 cents per pound, less than the present prices in greenbacks; he bought and sold these articles at that time; the rate for gold was three for one, and merchandise was higher than gold. In 1864, gold was twenty for one, corn \$7.00 per bushel, and meat at \$3.00 per pound.

Plaintiff then introduced WILLIAM D. STEWART, who testified that at October Term, 1866, James J. Scarborough, one

of plaintiff's attorneys, had witness called, and Scarborough asked him if he or his father had any objections to making said Rule *nisi* absolute, and witness told Scarborough that neither he nor his father had any defense that he knew of—he was his father's agent. He had a conversation with plaintiff in 1866, and plaintiff said the note and mortgage were given for a Confederate consideration, for \$88,000 bonds, rated at 80 cents in the dollar, Confederate money.

JAMES J. SCARBOROUGH testified for the plaintiff, that on the 17th March, 1866, when \$15,325 were paid on said note, Colonel Cutts sold to plaintiff twelve thousand acres of Florida lands in the Counties of Columbia and Suwannee, (as witness believes,) at \$2.50 per acre, and a bond or inchoate deed was taken from Cutts to plaintiff—no number, township or range was mentioned therein; that Cutts had a plat of the lands, with some that had been sold marked upon it; that plaintiff was to have his choice of the unsold lands, and to send an agent to examine them within two months, and then Cutts was to make a deed describing the lands; that plaintiff or his agent had not, within his knowledge, made said selection; and that he had no doubt, if he had done so, Cutts would have executed the proper deed; and that the amount of the lands by Cutts sold to plaintiff, was \$30,000, a portion of which was applied to other claims against Cutts, and \$15,325 applied as a credit or partial payment on the note secured by the mortgage.

Here the evidence closed.

After argument had, plaintiff's attorneys requested the Court in writing to charge the jury:

1st. That the (Scaling) Ordinance relied on is unconstitutional,—the Legislature and not the Convention being the law-making power; and the Convention had no right to pass said Ordinance.

2d. That if that be not so, if the jury believe that the note and mortgage were given for Georgia and Pensacola Railroad bonds which Cutts bought of Mordecai, by which Cutts obtained title to near or about one hundred thousand acres of

Florida lands, worth \$2.50 per acre, then the note and mortgage are not intended to be included within the ordinance.

3d. That if the jury believe the note and mortgage were given for Georgia and Pensacola Railroad bonds, which were of value to Cutts, the consideration is a valid one, the law not looking closely to the quantum of consideration, so it is lawful and of value to the defendant.

4th. That the value of Confederate money, under the proof in this case, (has nothing) to do with the question before the jury.

5th. That there is no want or failure of consideration plead, and defendant must abide by his plea or answer.

6th. That in relation to the payment of \$15,235 on the note, it is an executed partial payment for that amount only, and no part of it can be carried over or against the balance due on the note, unless there was an agreement it should be accepted in full payment; and further, said payment is evidence of a good, valid and subsisting debt at the time it was made.

During the trial Mr. Goode, one of defendant's attorneys, verbally requested the Court to charge the jury, that if the bonds, the consideration of the note sued on, were worth at the time the note was given, as much as the face of the note calls for in greenbacks, then the jury should find for the plaintiff; and that if the bonds, at the date of the sale and note, could have been sold for \$44,000 in Confederate money, and Cutts, with that Confederate money, could have purchased more of the usual commodities of commercial traffic than plaintiff can now do with greenbacks,—that the verdict of the jury should be for the (amount) claimed by the plaintiff.

The Court refused to charge as requested, in writing or verbally, (except as hereinafter stated,) and plaintiff excepted and assigns such refusal as error.

The Court charged the jury as follows: "The defendant sets up that this mortgage debt has been paid or discharged, and to show this, he sets up that this is an unexecuted contract, made during the late war, and is subject to be scaled



according to the provisions of the act of the Convention of the State of Georgia. If you are satisfied, from the evidence, that the intention of the parties was that this debt was to be paid in the currency then in circulation, then you have the right to scale the debt and fix the amount (of the debt) at this time in our currency.

"The rule to be adopted by you in fixing this amount under said ordinance, depends upon the view you may take of the facts of the case. If you believe it was the intention of the parties that plaintiff took the risk of the rise or fall in the value of Confederate money from the making to the maturity of the note, then you ought to execute the contract as near as you can; as the contract matured 1st January, 1864, if defendant had tendered the Confederate money at that time, and plaintiff had refused to receive it, this would have been a discharge of defendant; but as it is not pretended here that there was a tender, then the plaintiff is entitled to so much in the present currency as is equal to the value of the amount in Confederate money at that time.

"To find out the value of Confederate money at that or any other time, you may either take the brokers' rate of gold in Confederate money, with the discount or depreciation of our paper currency added thereto, or you may take any other standard furnished to you by the evidence in this case. For this purpose, I have allowed testimony to go before the jury, proving the value of corn and other property. You can, if you please, deduce the value of the currency at that time from this source. But should you believe that this result would not be equitable and just to either party, according to the facts of this case, then you may take the value of Confederate money at the time of the making of this note, to be ascertained as above stated. Besides this, you may, if it does not violate the terms of the contract as agreed upon as before stated, take into consideration the value of the consideration received by Colonel Cutts from plaintiff for the note, and adjust the equities of the parties by this method; but you ought to discard this, if you believe the true agreement

of the parties was to pay the note in Confederate treasury notes.

"As to the credit entered on the note since the war, you will find out if you can what was the agreement of the parties in relation to the same, and carry it out; and, if you are not satisfied from the evidence as to the intention of the parties, then you will find out, from the evidence, how this payment was made, and charge the plaintiff with the value of the same in our present currency."

To which charge plaintiff excepted.

The jury found a general verdict for the defendant, and thereupon the Court allowed defendant's attorneys to take an order to have said note and mortgage filed in the clerk's office as paid and satisfied, and plaintiff excepted.

Afterwards, during the term, and after a brief of the evidence had been agreed on and filed in office, upon request of plaintiff's attorneys, the Court passed an order requiring the defendant's attorneys to show cause, at Lee Superior Court, fourth Monday in January, then next, why a rule *nisi* for new trial in said case should not be granted, and "that the presiding Judge have leave to perfect the grounds of error alleged, and that the plaintiff's attorneys be allowed until that time to perfect their grounds for new trial."

The certificate of the Judge shows that said time and place were fixed by consent of counsel.

The Court adjourned 21st December, 1866.

On the 18th January, 1867, plaintiff's attorneys dismissed their said motion for new trial. On the 22d January, 1867, the Judge returned to Scarborough & Goode a bill of exceptions which had been tendered, because the brief of evidence was not correct, and notified them that he would hear them at said Lee Superior Court, on the fourth Monday in January, and required that they should give notice to defendant's attorneys of the time and place of said hearing by serving them with a copy of said order.

Upon this order is this entry by the Judge: "The bill was at my office on the 19th inst., after I had left for Decatur

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Court, as appears to me by proof." Defendant's attorneys acknowledged service of said order 24th January, 1867.

Defendant's attorneys protested against the Judge signing and certifying the bill of exceptions: 1st. Because it was too late: and, 2d. Because the plaintiff, at the time of the filing of this bill, had an application for a new trial pending in said case.

The Judge overruled these protests, because, as he says, the bill was at his office on the 19th January, while he was absent at Court, and because plaintiff's attorneys, when the bill of exceptions was tendered, signified their wish to dismiss their application for a new trial, which was allowed by the Court, and an order taken at Lee Superior Court, to which said case had been referred by consent of counsel, and then and there—to-wit, on the 30th January, 1867—signed and certified the bill of exceptions.

The bill of exceptions assigns for error "the charge of the Court, the rulings of the Court, and refusals to charge as aforesaid."

Attorneys for defendant in error moved to dismiss the bill of exceptions on the grounds stated in their protest. It was agreed that this motion and the whole cause be discussed together, and thus disposed of by the Court.

SCARBOROUGH & GOODE, COBB & JACKSON, attorneys for plaintiff in error.

H. K. MCKAY and W. HAWKINS, attorneys for defendant in error.

HARRIS, J.

The awarding of a new trial in this case makes it unnecessary to decide the question of continuance moved by plaintiff in error.

As this cause does not come up upon a motion for a new trial, and refused, which would have opened it to the consideration of other questions connected with it, our adjudication is confined to what we deem an error in the presiding Judge's

charge, and which must have led the jury to make the verdict it did, and which seems to be unauthorized by any of the facts stated in the record. We decline to pronounce any opinion upon any other of the instructions or rulings of the Judge, except as to that portion in the following words: "As to the credit entered on the note since the war, you will find out if you can what was the agreement of the parties in relation to the same, and carry it out; and if you are not satisfied from the evidence as to the intention of the parties, *then you are to find out from the evidence how this payment was made, and charge the plaintiff with the value of the same in our present currency.*"

It seems to be a very clear principle, that where parties make an agreement, by which one pays and the other receives a certain amount, and which amount is credited on a promissory note, the note is satisfied or discharged only *pro tanto*, that is to the extent of the amount so paid, and that the remainder due on the note stands unaffected by the entry of such partial payment.

The amount thus credited cannot be enlarged, *in the absence of any agreement of the parties*, so as to extinguish a greater nominal amount of the note than the amount specified in the credit entered on the note. To make the above idea more explicit, we hold that in this case the credit of \$15,325 extinguished that amount only of the note, leaving the remainder due on the note, after this allowance, in nowise affected by such payment.

Judgment reversed.

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Tucker vs. Toomer.

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JOHN F. TUCKER, plaintiff in error, vs. HENRY L. TOOMER,  
defendant in error.

NOTE.—WARNER, C. J., did not preside in this case.

This South Carolina mortgage sought to be enforced on lands lying in Georgia, can only be regarded (looking to the case made by the record) as a security for the payment of the debt due by Tucker to Toomer, for the purchase of a large number of slaves. The condition of the mortgage being broken by Tucker, the legal title was thereupon vested in the mortgagee, only for specified purposes, and it does not, therefore, operate as a payment.

The absolute ownership of these negroes (the possession never having changed after the sale) continued in Tucker until by the Acts of the United States Government they were made free, [and] the loss must be borne by him.

The facts of this case would not justify an apportionment of said loss between the vendor and vendee.

This case is fully covered by *Freeman vs Bass*, decided by this Court at June Term, 1866.

Foreclosure of Mortgage. In Chatham Superior Court.  
Tried before Judge FLEMING, January Term, 1867.

The points involved in this case arose upon the following state of facts:

On the first day of December, 1857, in South Carolina, John F. Tucker and Henry J. Dickinson, of Savannah, Georgia, executed and delivered their joint and several bond, in the usual form, in the sum of \$107,300.00 to Henry Laurens Toomer, of Charleston, South Carolina. The condition of said bond was that said Tucker and Dickinson should pay, or cause to be paid, to said Toomer, his executors, administrators, or assigns, the sum of \$53,650.00, to be paid as follows: \$17,833.33 1st January, 1861; \$17,833.33 1st January, 1862; \$17,833.33 1st January, 1863, with interest annually from the date of the bond on the whole amount unpaid, until the whole principal and any interest that may become due and unpaid shall both be paid and satisfied fully.

[On this bond the following payments were afterwards endorsed: 5th January, 1859, \$3,750.50, for interest up to 1st instant; \$3,750.50 10th January, 1860, interest to 1st Jan-

uary, 1860; \$3,823.37 on account of interest to 1st December, 1861; and three hundred dollars on account of principal, April, 1862; \$3,545.50 on account of interest for one year, and \$650.00 on account of principal, January 3d, 1863; and \$3,508.05 for one year's interest January 12th, 1867. Each of these endorsements was dated at Charleston, and signed by H. Laurens Toomer.]

On the said first day of December, 1857, said Tucker made and delivered to said Toomer his mortgage deed, in usual form, whereby he conveyed to said Toomer, &c., a part of the plantation named Drakie's, then lately purchased by William C. Daniel of J. A. Fraser, describing it by metes and bounds, for the purpose of securing the payment of said bond, and conditioned to be void upon such payment. This mortgage was recorded in Savannah 8th December, 1857, and in Charleston, South Carolina, 23d December, 1857. At May Term, 1866, of Chatham Superior Court, a *rule nisi* was had, calling on said mortgagor to show cause why said mortgage should not be absolutely foreclosed, and his equity of redemption be taken away.

The mortgagor for cause showed that said mortgages should be credited with the sums of money paid at the times and place stated in said endorsement; partial failure of consideration in this: that said bond was given for ninety-one negro slaves sold by said plaintiff to said defendant on the 24th November, 1857, and that on the 11th December, 1864, said slaves, or the survivors and increase of them, were captured by the military forces of the United States from out of defendant's possession, and emancipated and set at large without defendant's consent, in said county, and that afterwards, while said negroes were so out of defendant's possession, to wit: in the year 1865, by the concurrent action of the Governments of the United States and the State of Georgia, said capture and emancipation of said negroes were legalized, and thus said defendant wholly lost the property and services of said negroes; that without the fault of the defendant, and by reason of the late war between the United States and the Confederate States, and the consequent emancipation of the

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Tucker vs. Toomer.

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slaves, it became impossible for said defendant to perform the condition of said bond, and that such impossibility was equivalent to a performance thereof to the extent of the balance unpaid thereon on the 11th December, 1864; that on or about the 16th day of September, 1864, he was able and willing to pay, and then offered to pay, said balance in the money then current in the Confederate States, but that said plaintiff refused to receive said currency, only and solely on the ground that he could not invest the amount profitably; and that defendant was then willing and ready to deliver up said slaves, or a sufficiency of them, to said plaintiff, in discharge of said balance; but that the refusal of the plaintiff to take said currency, which was then the only obtainable and circulating currency, and the terms in which said refusal was conveyed, excused said defendant from further offer to perform, under the results of said war, the emancipation aforesaid, and the destruction of said currency, except, perhaps, as to the interest due on the bond; and last, that the debt, to secure which said bond and mortgage were executed, was contracted in South Carolina, in consideration of certain ninety-one negro slaves, to wit: on the 25th November, 1857, which was to be consummated by a mortgage on said slaves, and also personal security and the mortgage on said land. The bond, with personal security, and said mortgages were so executed and delivered, the mortgage on the negroes (being executed and delivered in South Carolina) was amply sufficient to pay said debt; that said bond became forfeited on defendant's first failure to pay, and thereupon, under the laws of South Carolina, the title to said slaves vested in the mortgagee, and the loss of said slaves by emancipation should and does in law fall upon said mortgagee; and their value being sufficient to pay said debt, the debt is paid.

Upon these pleadings the parties were at issue, and trial was had January Term, 1867.

The plaintiff read in evidence said bond and said mortgage deed on the plantation aforesaid, and closed.

Defendant then read in evidence a consent agreement of counsel, as follows: "It is admitted by counsel in this case,

"1st. That the agreement, bill of sale, and mortgage of the negroes, were made in the State of South Carolina, and are evidence for defendant.

"2d. That the mortgage of the negroes was delivered in South Carolina.

"3d. That the negroes were delivered in South Carolina to the defendant, and brought by him to Georgia, and were, with a slight increase, in his possession at the time they were emancipated."

And the following agreement, bill of sale, mortgage, and so forth, as follows :

## MEMORANDUM.

Articles of Agreement between Henry Laurens Toomer, by his agents, Capers & Heyward, of the first part, and Captain John F. Tucker, of Savannah, Georgia, of the second part, made this 24th day of November, Anno Domini 1857—Witnesseth that the said Henry Laurens Toomer, by his agents as aforesaid, doth hereby agree to sell and deliver to the said Captain John F. Tucker ninety-one negro slaves, (as per list herewith annexed,) the names of said slaves being printed thereon singly and in families, and to pay for the said ninety-one negroes separately and singly the sum of six hundred and fifty dollars each, to be paid for as follows: the sum of five thousand five hundred dollars to be paid in cash, and the residue unpaid to be paid by bond, with approved personal security, in three installments, as follows, viz: the sum of seventeen thousand eight hundred and eighty-three dollars thirty-three hundredths—\$17,883 33-100—on the first day of January, which will be Anno Domini 1861; the second installment, seventeen thousand eight hundred and eighty-three dollars thirty-three hundredths—\$17,883 33-100—on the first day of January, 1862; and the last installment of seventeen thousand eight hundred and eighty-three dollars thirty-three hundredths—\$17,883 33-100—to be paid on the first day of January, Anno Domini 1863, with interest annually from the date of said bond on the whole amount unpaid until the whole principal and any interest which may



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Tucker vs. Toomer.

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at any time hereafter become due and unpaid shall both be fully paid and satisfied. The said bond to be secured by approved personal security uniting with the said Captain John F. Tucker in the said bond, together with a mortgage of the negroes sold, and a further mortgage of his Savannah River plantation, known as "Drakie's," as a collateral security. And it is agreed between the said parties as aforesaid, that the delivery of the said negroes shall be at the plantation of the said Henry Laurens Toomer, on Ashepoo, from and after the first day of December next ensuing, and that the said Captain John F. Tucker as aforesaid shall incur the expenses of their removal.

And it is hereby further agreed by the aforesaid parties as aforesaid that the necessary papers, as usual, shall be paid by the said John F. Tucker as purchaser.

And the said John F. Tucker, of the second part, doth hereby agree to purchase the aforesaid negroes, as per list, at the price for each separately set forth as above, and to pay for, comply with, and conform to the requirements as set forth in the above agreement, in each and every particular part thereof, as above specified and set forth.

Witness our hands and seals, this 25th day of November, 1857.

H. LAURENS TOOMER.

By his agents, CAPERS & HEYWARD.

Witness:

JOHN F. TUCKER.

E. T. BURDELL.

I hereby, also, personally agree to and confirm the above articles of purchase and sale, as made by my agents for me and in my name.

Witness:

H. LAURENS TOOMER.

P. D. MORCOCK.

January 14th, 1858.

THE STATE OF SOUTH CAROLINA.

*Know all men by these presents:*

That I, Henry Laurens Toomer, of the City of Charleston, in the State aforesaid, for and in consideration of the sum of fifty-nine thousand eight hundred dollars, to me in

## Tucker vs. Toomer.

hand paid, at or before the sealing and delivery of these presents, by John F. Tucker, of the City of Savannah, in the State of Georgia, (the receipt whereof I do hereby acknowledge,) have bargained and sold, and by these presents do bargain, sell, and deliver to the said John F. Tucker, the following named ninety-two negro male and female slaves, viz: (stating their names.) To have and to hold the said slaves as above named and numbered, together with the future issue and increase of the females, unto the said John F. Tucker as aforesaid, his executors, administrators, and assigns, to him and his only proper use and behoof forever. And I, the said Henry Laurens Toomer as aforesaid, my executors and administrators, the said bargained premises unto the said John F. Tucker as aforesaid, his executors, administrators, and assigns, from and against all persons, shall and will warrant and forever defend by these presents.

In witness whereof I have hereunto set my hand and seal. Dated at Charleston, on the twenty-fourth day of November, in the year of our Lord one thousand eight hundred and fifty-seven, and in the eighty-second year of the sovereignty and independence of the United States of America.

H. LAURENS TOOMER. [L. s.]

Signed, sealed, and delivered in the presence of

WM. E. SIMMONS,

PHILIP S. POSTELL.

## THE STATE OF SOUTH CAROLINA.

*To all to whom these presents shall come,*

I, John F. Tucker, of the City of Savannah, in the State of Georgia, send greeting:

Whereas, I, the said John F. Tucker, as aforesaid, in and by my certain bond or obligation, wherein Henry J. Dickerson is named as surety, bearing date even with these presents, stand firmly held and bound unto Henry Laurens Toomer, of the City of Charleston, in the State aforesaid, in the penal sum of one hundred and seven thousand three hundred dollars, (\$107,300,) with a condition thereunto written, for the payment of the full and just sum of fifty-three thousand six

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Tucker vs. Toomer.

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hundred and fifty dollars, (\$53,650,) as in and by said bond and condition thereof, reference being thereunto had, will more fully and at large appear :

Now know ye, that I, the said John F. Tucker, as aforesaid, for the better securing the payment of the said sum of fifty-three thousand six hundred and fifty dollars (\$53,650) unto the said Henry Laurens Toomer, his heirs, executors, administrators, or assigns, together with lawful interest for the same, I, the said John F. Tucker, as aforesaid, have bargained and sold, and by these presents do bargain and sell, and in plain and open market deliver unto the said Henry Laurens Toomer as aforesaid, the following named ninety-one negro male and female slaves, to wit: (giving their names and ages.) To have and to hold the said slaves, as above named and numbered, together with the future issue and increase of the females, unto the said Henry Laurens Toomer as aforesaid, his executors, administrators, and assigns forever.

Provided, always, nevertheless, that if the said John F. Tucker and Henry J. Dickerson as aforesaid, or either of them, their or either of their heirs, executors, or administrators, shall and do well and truly pay or cause to be paid unto the said Henry Laurens Toomer as aforesaid, his certain attorney, executors, administrators, or assigns, the full and just sum of fifty-three thousand six hundred and fifty dollars, (\$53,650,) according to the true intent and meaning of the bond aforesaid, and of these presents, together with lawful interest, then this deed of bargain and sale, and all and every clause, article, and thing therein contained, shall cease, determine, and be utterly void and of none effect, anything hereinbefore contained to the contrary thereof, in any wise, notwithstanding.

And it is hereby declared by and between the said parties, and the said John F. Tucker as aforesaid, his executors, administrators and assigns, doth covenant, promise and agree to and with the said Henry Laurens Toomer as aforesaid, his executors, administrators and assigns, by these presents, that if default shall happen to be made of or in payment of the

said sum of fifty-three thousand six hundred and fifty dollars (\$53,650) as aforesaid, according to the true intent and meaning of the bond aforesaid, that then, in such case, it shall and may be lawful for the said Henry Laurens Toomer as aforesaid, his executors, administrators, attorneys or agents, from time to time, and at all times hereafter, peaceably and quietly to enter into any or all the messuages, lands or tenements of the said John F. Tucker as aforesaid, and to take the aforesaid negro male and female slaves and their increase into his custody and possession, and the same to hold and detain to his own use and behoof (as his own proper goods and chattels) from thenceforth and forever, or the same to sell and dispose of at will and pleasure; returning the overplus, if any should happen to be, after paying the said sum of fifty-three thousand six hundred and fifty dollars, interest, costs, and charges of collection, unto the said John F. Tucker as aforesaid, his executors, administrators, or assigns.

In witness whereof, I, the said John F. Tucker as aforesaid, have hereunto set my hand and seal, this first day of December, in the year of our Lord one thousand eight hundred and fifty-seven, and of the sovereignty and independence of the United States of America the eighty-second year.

JOHN F. TUCKER, [L. S.]

Signed, sealed and delivered in presence of:

JOHN COOPER.

R. F. AKIN, Notary Public C. C.

This mortgage was duly certified by a Commissioner of Deeds for South Carolina, (at Savannah,) and was recorded in Secretary of State's office in South Carolina, 23d December, 1857.

The said defendant here closed his case, whereupon the said plaintiff, as rebutting evidence, offered the following letters, which were read to the jury:

SAVANNAH, January 2, 1860.

H. LAURENS TOOMER, Esq.

Dear Sir:—I was in hope to-day I could have sent to you the amount of the interest due on the 1st inst. The weather

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has been very rainy for four or five days past, and I came into town through a heavy rain to-day, expecting to get money enough for sales of rice to have forwarded to you the amount due you for interest, but my factors could not advance me a dollar. Sales of rice are almost impossible to be effected, and they do not know who would pay if sold to, but I have directed them to sell if possible, and hope in a few days to be able to forward you the amount.

It is with feelings of sincere regret that I am compelled to say that it will be impossible for me to reduce the principal of my indebtedness to you. I regret it the more, as when I made the purchase I made it in good faith, expecting the instalments as they became due would be promptly met; but a series of misfortunes have befallen me since I made the purchase, and it is now only a question of time, which, if you will give me, will enable me to pay you all, and as these are troublous times we have fallen on, and an unparalleled commercial pressure, it is impossible to raise a dollar. I am compelled consequently to throw myself on your magnanimity and generosity, nor am I desirous that you should do so without being paid for it, and it will be much better than stocks or any other security at this time to invest in. I propose to pay you in addition to the legal interest,  $2\frac{1}{2}$  per cent. on all amounts of principal that I fail to pay when they become due, I giving you my note, payable on the first day of January, when the interest becomes due, say for the excess of interest the ensuing year, which would be considered in the light of commission, not interest, for advancing \$447 48-100, and so on for all amounts of principal not paid at maturity, would make the amount to pay you next January \$4,202 58-100 instead of \$3,755 50-100, making the investment equal to  $9\frac{1}{2}$  per cent. on all amounts of principal due. As I said before, it is merely a question of time, and I am not disposed you shall be the loser for a single dollar. It now rests with yourself whether I am ruined or aided along by your kindness, and should beg in these times your sympathy. I have considerable amount of money due me from parties here, but the appeals have been made to me, and I cannot

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find it in my heart to press them, (even if the law did not prevent it,) when there is no demand for what they have to sell nor money to buy with ; and as all seem to be struggling to vindicate our rights in the South, I trust that God will soften the hearts of all who hold the prosperity of another in their hands. Hoping that Georgia will soon follow the patriotic and noble example of South Carolina,

I am yours, very respectfully,

JOHN F. TUCKER.

Indorsed :

H. LAURENS TOOMER, Esq.,  
Charleston, S. C.

SAVANNAH, January 8th, 1861.

H. LAURENS TOOMER, Esq., Charleston.

*Dear Sir* :—Yours of the 4th instant came to hand this morning and contents noted. It is with sincere regret that I am compelled to say that in times like the present I cannot raise a dollar beyond the settlement of the interest due, which shall be paid in a very short time. You ask me to write you and let you know what arrangements I can make towards the settlement of the bond now due. I cannot raise the money without the sale of property. I cannot sell, for there are no purchasers, except at a price, in times like these, that some hard-hearted old usurer would stand and gloat over the large gains he might make because he had held his money to take advantage of just such times as the present. Deeply regretting the position my failure to pay has placed you, I have suffered ten thousand times more than the whole concern is worth, for the reason that I could not pay the money or help myself. When I pay the interest now due, it will make some over \$17,500 I have paid you in principal and interest, and I trust you will take such a view of the case as will enable us to get along amicably in this matter. I assure you it would afford me more pleasure to pay you, if I had the money, than to withhold it; in fact, more than to receive it, if I did not need it to pay a debt. I desire to do what is right, and will do so to the utmost of my power. You shall

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not lose one dollar, although it may inconvenience you to wait. I am, as I said before, desirous to pay you, but it is impossible for money to be raised at the present time, consequently can do nothing.

I am yours, very respectfully,

JOHN F. TUCKER.

The evidence being here closed, and the parties being at issue on the aforesaid petition and the objections of said defendant thereto, and especially the fifth objection in the record of said suit stated, the cause was argued on behalf of the said petitioner Henry L. Toomer, and the said defendant John F. Tucker ; the attorneys for the said John F. Tucker arguing and insisting that the aforesaid agreement for sale of negroes, the said bond, the said sale of negroes, and mortgage of negroes, became and were a contract made in and governed by the laws of South Carolina in its construction, application and enforcement ; that the said mortgage on land was only collateral or auxiliary to said contract in regard to the negroes ; that, after default made by the said mortgagee of the negroes, the title to said mortgaged negroes ceased to be conditional, and became absolute in said mortgagee, Henry L. Toomer, according to the said law of said contract, to-wit, the law of the State of South Carolina ; and that, consequently, the loss of the value of said slaves, by their emancipation, without the fault of said mortgagor, should fall on the said mortgagee, to the extent at least of the value of the legal title to said slaves, and should not fall on said mortgagor.

The argument on both sides having closed, the Judge charged the jury, amongst other things stated in the following motion, that whilst the law of the place of the contract should govern, yet it did not follow that the loss by emancipation of said slaves should fall on the mortgagee, who became the legal owner on condition broken, and that the loss which said mortgagee suffered by said emancipation was only his mortgage security on the slaves, and not the loss of the debt. Whereupon, the jury retired and found for said

plaintiff that the rule *nisi* on said petition for foreclosure be made absolute.

John F. Tucker, by his attorneys, moved for a new trial on the following grounds :

1st. Because said verdict was contrary to law.

2d. Because said verdict was contrary to evidence.

3d. Because said Court erred in charging the jury that the loss of slaves by the act of emancipation did not fall upon the legal owner.

4th. That the Court erred in charging the jury that, to fasten the loss upon the owner, he must have not only the legal but the beneficial interest.

5th. Because the Court erred in charging the jury that, when, under the law of Carolina, the mortgagee became the legal owner by breach of condition, he holds as trustee for the mortgagor.

6th. Because the Court erred in charging the jury that, when, under the law of South Carolina, the property became vested in the mortgagee, the loss of the property so vested did not cancel the debt to the extent of the property so lost.

7th. Because the Court erred in charging the jury that upon the facts agreed upon and the law as given them in charge, they must find for the plaintiff.

8th. Because the Court erred in charging the jury that, although, in the case of emancipation of slaves, the loss should fall upon the parties in interest in proportion to their interest, yet in this case that the loss should fall entirely upon the defendant, John F. Tucker.

The new trial was refused.

To which decision overruling said motion for new trial, the said John F. Tucker, by his attorneys, excepted, and assigns for error—

1st. That said Judge erred in refusing said motion for new trial, under the evidence in said cause.

2d. That said Judge erred in refusing said motion for new trial, under the law applicable to said cause.

3d. That said Judge erred in refusing to grant a new trial under the law and the evidence in said cause.



4th. That said Judge, whilst admitting, in said written decision, that said mortgage on negroes was a South Carolina contract, governed in its construction by the laws of South Carolina, which, on condition broken, vest the legal title to the mortgaged property in the mortgagee, yet erred in refusing said motion for new trial, and in deciding that the loss of the value of said negro slaves by emancipation should fall wholly on said John F. Tucker, under all the facts and circumstances in said cause.

5th. That said Judge, in said decision, erred in deciding that in said cause the mortgagee was or could be the trustee of the mortgagor, after condition broken as aforesaid.

6th. That said Judge, in said decision, erred in deciding that the loss of the value of said negro slaves, by emancipation, ought rightfully to fall on said John F. Tucker as mortgagor, and not on said Henry L. Toomer as mortgagee.

7th. That said Judge erred in refusing said motion for new trial in said cause.

HARRIS, J.

The principles involved in this case were decided in *Bass vs. Freeman*, 34 vol. Ga. Repts., p. 369.

In that case it was contended by counsel of Bass, that the instrument executed by him was a mortgage under the laws of ARKANSAS; that by the laws of that State, that, upon condition broken for the payment of the purchase money,—the title to the negroes ceased to be conditional, but became absolute in Freeman, and consequently as the legal title was in Freeman at the time of the emancipation of the slaves by war, the loss of the value thereof should, as there was no fault in mortgagor in causing their emancipation, fall upon the mortgagee, or at least in equity, be apportioned between the parties. The written opinion of Judge Walker does not entirely cover all the points made and considered and passed upon by the entire Court, or it would have been readily perceived by plaintiff in error here, that all the material questions made by his bill of exceptions, had been adjudicated.

With what has been said, we might appropriately stop ;

but it may not be without value to add a remark or two;—they will have accomplished some useful end, should they elicit professional thought and investigation.

It occurs to us that the fundamental vice of the whole claim of Tucker to relief, is founded upon the assumption that the sale of the negroes to him was *conditional*, and that an *absolute title*, free from any equity of redemption, revested upon breach of payment by him—in Toomer the vendor.

Even had the South Carolina mortgage in this case contained the most stringent agreement for the exclusion of interference by a Court of Chancery, as by taking away the equity of redemption, that Court will never permit such an agreement to prevail, or any agreement which would change a mortgage into an absolute conveyance, upon any condition or event whatever. Howard vs. Harris, 1 Vernon, 190; Leton vs. Shade, 7 Vesey, 273; Williams on Real Property, 355-6, top page.

In this we discover an adherence to the old law maxim, "Once a mortgage, always a mortgage."

The whole equity of the mortgagor Tucker, consisted in, 1st, his equity of redemption, and 2d, in the right (had possession of the negroes been taken by Toomer and a sale made of them under the covenant allowing such sale, or under foreclosure,) to the excess of money raised over and above the payment of the debt, principal, interest and costs, to the mortgagee.

We conclude what we have to say by a quotation from Chancellor Kent's Com. 4 vol., 157, as it covers the entire reasoning upon which the Bass case and this were decided.

"In ascending to the view of a mortgage in the contemplation of a court of equity, we leave all these technical scruples and difficulties behind us. Not only the original severity of the common law, treating the mortgagor's interest as resting on the exact performance of a condition, and holding the forfeiture or the breach of a condition to be absolute by non-payment or tender at the day, is entirely relaxed; but the narrow and precarious character of the mortgagor at law, is changed under the more enlarged and liberal jurisdiction of

the courts of equity—their influence has reached the courts of law, and the case of mortgages is one of the most splendid instances in the history of our jurisprudence, of the triumph of equitable principles over technical rules, and of the homage which these principles have received, by their adoption in the courts of law.

The opinion of Judge Fleming, pronounced in overruling the motion in this case for new trial, is so marked by vigorous logic and sound common sense, that we append and adopt it as fully expressing the reasons by which we are influenced in affirming his judgment.

OPINION OF JUDGE FLEMING.

HENRY L. TOOMER vs. JOHN F. TUCKER. Motion for New Trial.

This motion for new trial having been submitted without argument, I propose to do little more than to give the substance of my charge to the jury,—from which it will appear whether the exceptions to my charge, and which exceptions are the ground upon which this motion is made, are well founded. I charged the jury

1st. That the mortgage of the negroes, introduced as evidence in the cause for the purpose of proving payment, and upon which the argument has been made, is a South Carolina contract.

2d. That, being a South Carolina contract, it is governed in its construction by the laws of South Carolina.

3d. That by the laws of South Carolina, in a mortgage of personal property upon condition broken, the legal title to the property mortgaged, becomes vested in the mortgagee.

4th. That this vesting of the legal title in the mortgagee, does not operate *eo instanti* as a payment of the debt due on the mortgage, but is intended to give the mortgagee control of the property, so as to enable him with more ease and facility, speedily to collect his debt by applying the property, or so much of it as might be necessary for that purpose. That until such application was made, there was no payment. I

don't mean that the mortgagee upon taking possession of the property, may be negligent in the use of his power to apply it to the payment of his debt. If loss accrues by reason of his negligence, he would doubtless be answerable for such loss. I am now only controverting the position of defendant's counsel, *that condition broken operates as payment*. I say that it gives him control of the property for the purpose of enabling him the more speedily to apply it to the payment of the debt. If he proceeds with due diligence to do this, it is then and then only, that the payment is consummated. If loss occurs without his fault, it must fall on the mortgagor. Suppose that upon condition broken, the mortgagee proceeds at once to assert his rights, he takes possession of the property, but before he could advertise and sell, the negroes die; would his debt be paid? Assuredly not. Substitute emancipation for death, and where is the difference? In either case he fails to realize anything, and surely he cannot be made to credit more than he does realize, unless the failure to realize has been the result of his own conduct. Now if such be the case where the mortgagee proceeds with all the diligence he can, to assert his legal rights by taking possession of the property, how much stronger is the case for him, when he abstains from the assertion of his legal rights and suffers the property to remain in the possession of the mortgagor, at his (the mortgagor's) own earnest request. If death or emancipation, while in the hands of the mortgagee and before he could realize, relieves the mortgagee from the obligation to give credit on his debt, then surely he is relieved from all obligation to give credit, if death or emancipation occurs while the property is in the hands of the mortgagor, and in his hands at his (the mortgagor's) request.

Again, suppose that the mortgagee finds it impossible to take possession of the property, as may happen if the property is in the hands of a third party under purchase from the mortgagor, in such a case he may have to institute a suit,—is he bound to give credit before recovery had? Assuredly not. But *he is bound* to give credit if it be true that the debt is paid on condition broken. In such a case, the mortgagor,

with the price of the negroes in his pocket, is entitled to be credited again with their value on the mortgage. There is no escape from this result, if the position of the defendant's counsel be right.

I would not speak disrespectfully of any position taken by the learned counsel who represent the defendant in this case, but I must say that I have no patience with this argument. It seems to me to be an outrage alike upon common sense and common justice.

That I am right in the views I have expressed, is evident from the practical operation of the law in South Carolina. What is the course pursued in South Carolina in the collection of debts of this kind? So far as I am informed, the course is this: *upon condition broken* the mortgagee either proceeds himself, or if he chooses, he places his mortgage in the hands of the sheriff or of some friend, who takes possession of the mortgaged property, to sell it and credit the net proceeds of the sale. If the property sells for less than the debt, the mortgagor is still liable for the deficiency; if it sells for more than the debt, the overplus goes to the mortgagor. This I understand and believe to be the usual proceeding in South Carolina. If I am not mistaken in this, then clearly condition broken is not regarded as payment, although by the law of that State, condition broken vests the fee in the mortgagee. For if it be payment, then there can be no deficiency for which the mortgagor is still liable,—and if there be an overplus, the mortgagor would have no right to it. In one word, if the mortgaged property is the property of the mortgagee in the absolute sense contended for by counsel,—then the money for which it sells would also be absolutely his, and there would be no obligation to pay over the surplus. What better proof do we want that the vesting of the legal title in the mortgagee, is simply for the purpose of enabling him more speedily and effectually to collect his debt? To this extent the mortgagee is but the trustee of the mortgagor, and the trust becomes executed when the property, or so much of it as may be necessary, has *been applied to the payment of the debt*. If before this is done, loss occurs without the fault of

the mortgagee, by death or emancipation, it does not fall upon the mortgagee; for up to that moment the debt is unpaid, and remains unpaid unless the death or emancipation of the negroes, has the effect of payment. It does not necessarily follow that the loss must fall upon the mortgagee, because under the law he is the legal owner; for, though he be legal owner, he is made so for a special purpose. It has been harped on in the argument, that the loss must fall on the legal owner; that I at this very term so decided. In the case referred to, the legal owner was the *absolute* owner,—not the legal owner for a particular purpose. He not only held the legal title, but he had the beneficial interest. An executor or administrator is the legal owner of the personal property of the estate; but if a negro dies or is emancipated, who loses—the executor or the heirs and distributees of the estate? Loss, then, does not necessarily follow the legal title. That the vesting of the legal title in the mortgagee does not operate as payment, is evident also from this; that if it be true, then when a mortgage of personal property has been taken to secure a debt, it destroys every other security that a creditor may have, and puts it out of his power to add to his security. Suppose for example that the creditor has in addition to his mortgage, taken personal security, as I believe was done in this case, he could never make that personal security liable. Why? Because, so long as the conditions of the mortgage were complied with, every installment paid as it fell due, he would have no right of action,—and upon *condition broken*, he would have no right to proceed against the security, *for then the debt would have been paid*. In other words, the failure to pay is *payment*.

I want no stronger argument against the proposition of counsel than is contained in the proposition itself. Let me present another view, to show that the legal title vested in the mortgagee by condition broken does not create that absolute ownership which would cast the loss by emancipation on him. If under certain circumstances he is to be prejudiced, then under certain other circumstances he ought to be benefited. “It is a bad rule that don’t work both ways.” If the

mortgagee is to lose all by emancipation, when it would take all to pay his debt, then if there had been no emancipation and the property was more than sufficient to pay his debt, he ought to gain the excess. Why should he lose in the one case and not gain in the other? If there had been but one thousand of this fifty thousand dollars remaining unpaid, the failure to pay that one thousand dollars would vest that legal title in him as fully and effectually and absolutely as the failure to pay fifty thousand dollars. If in the one case he is to lose the ninety negroes, in the other he ought to gain them. The truth is, that either proposition is monstrous. All this absurdity is avoided if what I contend for be true—that the legal title is vested in the mortgagee for the purpose of enabling him to collect his debt. He is bound to account to the mortgagor for such amount as he may realize from the property. I care not whether this accountability is at law or in equity; it is enough for my argument that he is accountable. If the property more than pays his debt, he is liable for the excess. If it falls short of paying his debt, the mortgagor is still liable for the deficiency. This must be law, for it is justice.

I grant that if loss occurs by reason of the neglect or fault of the mortgagee, he is responsible. But nothing of the kind has been shown in this case. Neither party is in fault. True, the mortgagee did not assert his legal right immediately on condition broken; but it is also true that the mortgagor earnestly appealed to him for indulgence. The negroes were allowed to remain with the mortgagor at his own request, and were in his possession when emancipation came. The result, to my mind, is very clear; the mortgagee has lost his *security*, the mortgagor his means of payment, so far as that security or those means depended on the negroes mentioned in the mortgage.

JAMES M. JONES, plaintiff in error, vs. GEORGE T. ROGERS and SON, defendants in error.

NOTE.—WARNER, C. J., did not preside in this case.

1. Concentration by the agency of the press, or by associations of public opinion to effecuate any laudable intent, as to support the Government or to sustain legally its currency against depreciation, cannot be considered as "duress." A person acting under the influence of public opinion, thus produced, is entitled to no relief in any Court, for acts done by him under the legitimate pressure.
2. But when his debtor, being a member of a vigilance committee created under the recommendation of a large public meeting of the citizens, and who publicly announced "that they will hold all persons as enemies of this Confederacy who shall by any means depreciate the Confederate currency, or shall refuse to receive it in payment of debts, and will use their best endeavors to bring all such persons to condign punishment by legal means, if the laws provide such punishment, but if not, with or *without law*"—reports the creditor to the vigilance committee for having refused to receive from him, in payment of a debt due before the war, such currency, and *thereupon* the creditor is summoned to appear before the committee to answer for his conduct, and in the meeting is denounced by a member of the committee as a traitor, and publicly on the streets by another, the receipt of the Confederate currency under such circumstances was involuntary; it was under constraint, "duress," and fear produced by the threat of bringing him to condign punishment *with or without law*; fears for his personal safety endangered by his denunciation as a traitor.
3. Equity in such case will grant relief.

Equity. Duress. Tried before Judge COLE, Bibb Superior Court, January Adjourned Term, 1867.

Complainant avers that on the 20th of August, 1862, George T. Rogers and Charles H. Rogers (using the firm name of George T. Rogers & Son) made and delivered to him their promissory note, due one day after its date, for \$1,354.23, which indebtedness arose as follows: Complainant in 1857 loaned James G. Rogers, son of said George T., and then a merchant in Savannah, \$4,000.00, on the endorsement of said George T. Rogers & Son, and on the — day of —, 1859, said firm assumed said indebtedness and took control of the notes or drafts constituting said previous in-



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debtedness, and gave their own notes for the same; and their said note of \$1,354.23 was given in renewal of the balance of their said note given in 1859. On or about the — day of September, 1863, said firm offered to pay off said promissory note in Confederate Treasury notes, (at par,) which were then greatly depreciated. Complainant had for years had his money loaned out for interest as an investment, and having no occupation or pursuit in which he could advantageously use said Confederate Treasury notes, he refused to receive the same in payment of said note. Thereupon, said firm threatened to report complainant to "the Vigilance Committee," then organized and appointed by a public meeting of the citizens of Macon, which committee consisted of Thaddeus G. Holt, Chairman, Preston E. Bowdre, Charles Collins, Thomas A. Harris, William B. Johnston, William T. Mix, Robert B. Barfield, Jackson DeLoache, John J. Gresham, said George T. Rogers, and perhaps others, who were organized and charged to look after and regulate and punish offending citizens who refused to take Confederate Treasury notes in payment of debts due to them before the war then existing; that a resolution of a meeting of the citizens of Macon, passed 17th Feb., 1863, was the foundation of that committee's authority, said committee having been appointed by the City Council of Macon in conformity thereto; and that said resolutions embraced the scope of the authority assumed by said committee, which acted in conformity thereto.

The resolutions alluded to are here set out, and are the same hereinafter set forth in the evidence as the proceedings of said meeting.

At the time of such refusal, and as an additional reason therefor, Vicksburg and Port Hudson had fallen, by which the Southern Confederacy had become irrevocably severed by Federal occupancy of the Mississippi River, and the Confederate Army of Virginia had been defeated at Gettysburg, and the Western Army of the Confederate States had fallen back before superior forces from Tullahoma; and complainant really believed the subjugation of the Confederate States was

only a question of time, and Confederate Treasury notes, in comparison with specie, was then at fourteen to one discount, and complainant then believed they would be worthless; and again, said firm were then actively engaged in merchandizing for Confederate money, and could more safely employ such capital than could complainant; and in 1859 complainant had sued said firm for this debt, and had withdrawn the suit, (because said George T. represented that his credit would be thereby injured,) and made the arrangement already stated.

Said firm reported said refusal to said Chairman of said Vigilance Committee, who notified complainant to receive said funds from said firm, and threatened to assemble the Committee and call complainant before it if he did not. Complainant still refused, and was cited by said Chairman to appear before said Committee on the 10th September, 1863; and in view of the threats of members of said Committee to publish complainant as a traitor, and of the danger to his person and property consequent upon continued refusal, and upon the advice of one of said Committee, James H. R. Washington, (who fully justified complainant in his legal and moral right to continue such refusal,) to yield up his rights and accept said Treasury notes at par, complainant authorized said Washington to represent him before said Committee and do whatever he thought best, and so to inform said Committee. Washington attended the meeting, (where was also George T. Rogers as a member,) and in view of the threatening attitude of a majority, and the danger of disturbance to complainant in the community, Washington withdrew complainant's refusal, and promised that he would take the said Treasury notes at par for said debt; and thereupon complainant gave up his note and took said currency therefor at par. Complainant did not invest said funds in property, but with other funds it was converted into State Treasury notes, which have been repudiated, (complainant having of them at the date of repudiation and now \$1,493, and \$550 loaned on call in March, 1865, all of which is now worthless.

Complainant waives all answer to the bill, except to these interrogatories:

INTERROGATORY 1ST. Did not said Jones, on or about 20th August, 1862, receive the promissory note of Rogers & Son, due one day after date, for \$1,354.23, or about that sum? and what was amount of same, its date, and when due?

INT. 2D. Was not this note given in renewal of the balance due on a note or notes he held on Rogers & Son for a settlement of about \$10,000, or other large sum, in 1859, by which said Rogers & Son became possessed of and the owners of the note or draft for that sum, previously held by said Jones made or drawn by James G. Rogers, and endorsed by said George T. Rogers & Son, and on which said Jones forebore suit, and made said exchange? what was the amount of said draft, its date, and when due; and who were the drawer, endorser, and acceptor?

INT. 3D. Did not said Rogers & Son, in September, 1863, offer to pay said promissory note to said James M. Jones, alluded to in interrogatory first, in Confederate Treasury notes at par, and did he not refuse to receive them in payment, and on such refusal did not Rogers & Son notify the Chairman of the Vigilance Committee as aforesaid of the fact, and did said Rogers & Son afterwards, and about that time, pay off said note in said Confederate Treasury notes at par to said Jones? when was the payment made, and how much in Confederate Treasury notes was given in payment of the same, and when?

Complainant avers that he was thus forced into delivering up said note, and prays that he now have a judgment for the amount due on the same, and for such other and further relief as is equitable in the premises.

Both defendants answered that complainant loaned to James G. Rogers \$4,000.00 on or about the 14th July, 1857; James G. Rogers drew a draft on Way & Taylor, of Savannah, for \$4,500.00, July 14th, 1857, payable twelve months after date, to order of George T. Rogers & Son, which draft was endorsed by George T. Rogers & Son, who got nothing therefor, but endorsed for accommodation only, and accepted

by Way & Taylor, and delivered to complainant in consideration of said loan.

On 8th July, 1859, the said draft was taken up, and in lieu of it said James G. Rogers made his note for \$5,080.07, payable 17th July, 1859, to order of said Rogers & Son, and endorsed by them and said Way & Taylor. When and after this last note was due, George T. Rogers & Son paid all of it except about the amount for which the note of \$1,354.23 aforesaid was given, and took up the note for \$5,080.07. Complainant states the date of the last note correctly; defendant did propose to pay this note in Confederate Treasury notes; complainant did refuse to receive them. George T. says he did not threaten to report him to the Vigilance Committee, or make any other threat; said note for \$5,080.07 was in hands of Stubbs & Hill for suit, but suit was withdrawn, under what circumstances not recollected.

GEORGE T. also answers that he did report said refusal to the Chairman of said Committee, but does not know what said Chairman did or said on the subject to complainant; that afterwards, sometime in September, 1863, they did pay off said note at its face, principal and interest, in Confederate States Treasury notes.

CHARLES H. ROGERS also adopts the statements as to the time when and the currency in which said note was paid off, and states that snit was withdrawn upon a proposition of complainant, and admits that something was said about suit injuring credit of the defendants; he answers that more than once in May or June, 1863, he offered to pay said note in Confederate Treasury notes, (before Vicksburg fell,) and also offered to pay him in cotton when it was about 45 cents per pound; and that complainant refused these offers. He says nothing as to reporting to Vigilance Committee or threats, and sets up that that the notes *ab origine* were tainted with usury. They claimed that the note was paid.

Upon the trial, after the bill and answers had been read, the parties introduced the following evidence:

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## EVIDENCE OF COMPLAINANT.

THADDEUS G. HOLT testified that he was Chairman of Committee appointed by the City Council under the resolutions of the meeting of the citizens of Macon, of February, 1863. About 1st September, 1863, George T. Rogers notified him, as such Chairman, that complainant had refused Confederate Treasury notes in payment of a debt due to complainant by George T. Rogers & Son. Witness shortly thereafter met complainant in the street and told him of said complaint, advised him to take the money, but complainant refused. Witness told him if he persisted in refusing witness would call the Committee together and lay the case before it.

Complainant persisted. Witness called the Committee to meet September 3d, but at request of complainant, and because he was indisposed, the meeting was postponed to 5th of that month.

On the 5th, part of the Committee assembled, to wit: (as well as recollected) T. G. Holt, J. B. Ross, J. J. Gresham, W. B. Johnston, Charles Collins, P. E. Bowdre, T. A. Harris, J. DeLoache, George T. Rogers, G. W. Price, A. Mix, Robert B. Barfield, and J. H. R. Washington.

Complainant was not present, but J. H. R. Washington claimed that he was authorized to represent him, and did so. Complainant's said refusal was stated to the Committee, and after discussion, but before final action, Washington stated that complainant would take the money.

Witness does not recollect what was said in the discussion; thinks Charles Collins and T. A. Harris expressed themselves most strongly against complainant's said conduct.

On cross-examination, witness said he did not understand that the said Committee had or assumed to have power to punish for such refusals, the object being to make citizens take said Treasury notes by bringing to bear public opinion on them; that as such Chairman he never undertook to carry out the resolutions of February, 1863, except by force of public opinion as aforesaid; that he knew of no threats being made by any of the Committee.

ROBERT B. BARFIELD testified that he was present as a member of said Committee on said occasion ; complainant was absent, but represented by said Washington, one of the Committee ; the matter was discussed ; some of the Committee were violent in denunciation of complainant's said course ; he did not recollect all that was said, but thinks that Charles Collins, then or shortly before, said that if complainant persisted in his said refusal, he ought to be published as a traitor, or words to that effect ; after the discussion had progressed, Washington, apprehensive that a majority of the Committee would be opposed to complainant's course, notified the Committee that complainant would receive said currency.

Before the meeting, witness advised complainant that he did not think it would be safe for complainant to persist in his said refusal, and Washington assured complainant after the meeting had adjourned that he had told the Committee that he, complainant, would take the currency, and that, in his opinion, it was not safe for complainant to refuse it.

Witness is satisfied from what took place with the Committee, afterward and during the same meeting, in the case of Dessau, that the Committee would have been against complainant had not Washington acted as aforesaid.

In Dessau's case, (for such a refusal) and for refusal to meet the Committee, a Sub-Committee of three was appointed to wait on Dessau, of which Charles Collins was Chairman ; Collins afterwards said Dessau would take the money, but whether he did take it, witness knew not.

On cross-examination, he stated that J. B. Ross, A. Mix, J. DeLoache, W. B. Johnston, G. W. Price, were moderate men. Witness and Washington were there (opposing the action) as friends of complainant.

ALBERT MIX testified that he was at said meeting of the Committee ; strong feeling was exhibited by the majority against complainant ; some violently denounced his conduct ; thinks Charles Collins one of the most violent, though he could not recollect what was said.

GABRIEL B. ROBERTS testified that from the 1st to the 15th September, 1863, said currency was at the rate of fifteen

for one in gold in Macon. He further stated that he was a citizen of Macon and well acquainted with his fellow-citizens, and was thereupon asked "whether, from such knowledge, he did or did not believe that at that time, September 15th, 1863, complainant could with safety to himself have publicly refused to take Confederate Treasury notes for said debts."

Upon objection made, the Court refused to allow said question answered.

Complainant testified in his own behalf that he loaned James G. Rogers \$4,000.00 for twelve months, and took his draft therefor on Way & Taylor, of Savannah, accepted by them and endorsed by defendants for \$4,500.00, that being the customary rate at which the banks were discounting such drafts; in July, 1858, the draft was renewed in same way and at same rate for six months, the interest being added in; when this was due, or shortly afterward, it was again renewed for six months at same rate of discount, and changed into a note on James G. Rogers, endorsed by Way & Taylor and George T. Rogers & Son, for \$5,080.07, on 17th February, 1859; when this note was due, complainant got Hill & Stubbs to sue on it, and took the writ to George T. Rogers & Son to get acknowledgment of service. They asked not to be sued; said suit would injure their credit, and proposed to take up the note and give their own for same amount, if further time were given. Complainant thereupon divided the debt into installments, due at different times, with seven per cent. interest, and took the notes of Rogers & Son, without security, in payment of said note. On 20th Aug., 1862, said last notes had been paid off in money and notes, except a balance of \$1,354.23, and for this they gave a note in renewal.

No offer was made to pay this last note till in July or August, 1863, after the fall of Vicksburg and Port Hudson, the falling back of General Bragg to Chattanooga, and the battle of Gettysburg.

Up to these events, witness had taken \$4,000 or \$5,000 in currency for debts due before the war, and when the currency was of little use to him for re-investment, and he refused to

take any more ; so told Rogers & Son and his reasons for refusing, to-wit : that his capital had been invested in loans before the war, and he had lost as much as he could afford to lose ; Rogers asked him to take the money and invest it in cotton ; witness replied that he was not trading or speculating, nor had he been, but as he, Rogers, was, he ought to invest the money and keep it till he could pay something valuable. About September, 1863, Rogers persisting in his offers, complainant peremptorily refused the currency on Saturday, August 29th, 1863.

On Monday following, complainant was called on by T. G. Holt, chairman of said committee, on the street, and they commenced a discussion about said refusal ; complainant replied that George T. Rogers had been complaining of him ; Holt admitted that he had, and insisted that complainant should take the currency from Rogers ; complainant attempted to reason with him, rehearsed what he (complainant) had said to Rogers, and said that he (Holt) and the other members of the committee, who had their capital invested in railroad and factory stocks, and lands and other property, would not exchange their investments for such currency (then so much depreciated) at par ; complainant reiterated his refusal, and Holt said he would call the committee together ; Holt, at complainant's request, gave him the names of the committee-men ; a day or two afterwards, complainant was formally notified to appear before said committee, by a city policeman, on Thursday of that week ; witness, on account of sickness, sent a note to said chairman, asking a postponement of the case till Saturday, and received the following reply :—

*September 3d, 1863.*

MR. J. M. JONES :

*Dear Sir:*—Your note is received. In reply, I have no power, at this late moment, to postpone the meeting of the committee. The committee may postpone the investigation, on the reception of your note to me, giving notice of your indisposition.

Very respectfully,

T. G. HOLT.



The investigation was postponed till Saturday. Before that meeting of the committee, complainant conversed with one of the committee, P. E. Bowdre, who said he thought it was treason to refuse to take the currency, but as complainant thought differently, he would not say that of complainant. Some hour or two before the meeting, complainant met Charles Collins, one of the committee, on the street. Collins told him to take that money from Rogers; complainant replied that he would not, that it was an outrage. Collins said if he did not take it, he would be published to the world as a traitor. Complainant then went to the bank and saw J. H. R. Washington, one of the committee, and told him to represent the case before the committee, and entrusted the whole matter to him, to do what he thought best under the circumstances. Washington agreed to attend the meeting and represent complainant.

After the meeting, Washington reported to complainant that he had agreed before the committee, that the money would be received, and that while he regarded it as a great outrage upon complainant's rights to be compelled to do so, he did not think him safe in refusing. R. B. Barfield, another of the committee, who had attended the meeting as complainant's friend, gave the same advice. Thereupon complainant delivered up said note and took Confederate treasury notes at par therefor. He put said treasury notes with his other money, and never invested it further than endeavoring to exchange his treasury notes for State treasury notes of the State of Georgia, payable in Confederate States treasury notes, and receivable for State taxes, and had them at the end of the war, and now has of such State treasury notes \$1,493, and in Confederate money \$68, and loaned on call in March, 1865, \$500, and valued at the time at about sixty for one in gold. Complainant took said currency from Rogers & Son because he did not consider it safe for him to refuse to do so longer, under the circumstances.

The following appeared in the *Georgia Journal and Messenger* of February 25th, 1863, and was read in evidence :

## PUBLIC MEETING IN MACON.

*Macon, February 17th, 1863.*

In pursuance of a call published in the *Daily Telegraph*, a large number of the citizens of Macon and the surrounding country, assembled this day in the City Hall.

The meeting was organized by calling the Hon. T. G. Holt to the chair and appointing W. D. Williams Secretary. The Chairman, on taking his seat, made known the object of the meeting, and announced that it was ready for business. On motion of Col. Whittle, a committee of five was appointed by the Chair, to-wit; Messrs. L. N. Whittle, Nathan Bass, J. J. Gresham, W. B. Johnston and A. Lockett, to consider and report business for the action of the meeting.

Isaac Scott, Esq., being present, rose and stated that he had been informed by a friend, that certain transactions in which he was a party, were in part the occasion of the call of this meeting; and if such were the case, he desired permission to make some remarks. On motion of Col. W. B. Parker, this permission was granted, and Mr. Scott accordingly occupied the attention of the meeting for a short time with some statements and explanations in regard to said transactions. The committee having retired, returned and reported the following preamble and resolutions, which, on motion of Col. W. K. DeGraffenreid, were unanimously adopted :

"Although, happily for us, we ourselves are remote from the actual din of battle and clash of arms, and are allowed to enjoy in ease and security, the comforts of our homes and firesides, still we recognize the fact that we of Georgia, together with our sister States of the Confederacy, are in the midst of revolution and war, and that these blessings are allowed us in consequence of the energy and gallantry of our young men, of our brothers, sons and friends, who have rushed to the field and are now confronting our enemies, offering themselves willing sacrifices for us, for our property,

and for their families whom they have left behind and in our keeping.

"We are engaged in a war, whether considered in view of the numbers engaged on either side or the mighty results which must invariably follow to us, involving liberty and independence on the one hand or utter subjugation and ruin on the other, of such magnitude as the world never before saw, and this with one of the most powerful nations of the earth, outnumbering us near three to one, requiring on our part not only unity of purpose but concert of action, and the active development of every power and aid to assist and sustain our young government and brave troops in the mighty and unequal contest in which we are engaged; with this union and concert, smiled on as we feel we have been heretofore by a kind and gracious Providence, we must succeed, unless we shall be shorn of our strength by enemies lurking in our own midst, under the guise of friends.

"To wage this war does now require and will require to keep troops almost innumerable in the field, to supply them with clothes, sustenance and transportation, to manufacture and supply immense quantities of arms and all the munitions of war, to provide for and take care of the wives and children whom our volunteers have left in our charge, while they are away battling, and if need be, dying in our defence; these and each and all of them, will require large sums of money to procure and supply, and without which the struggle must be given over; indeed, without money for the future, as well as now, we are already vanquished.

"Our young government, not yet two years old, being cut off from all commercial intercourse with the world, hemmed in by the powerful navy of the enemy, is forced to rely on her own resources for money as well as for all other requisites to carry on this war for our independence, and although containing within itself all the elements of wealth sufficient even for this great emergency which is upon her, she is forced while the blockade of her ports shall continue, to resort to her credit until she shall be able to send abroad and dispose of the rich commodities with which almost every

farm in the land is filled, so that for the time, this credit as used by our government, the Confederate currency is to us, all in all.

"Destroy this credit, break down this currency, and our armies must of necessity at once give up the fight and come home, and we with them occupy the position our enemies in no other way have been or will be able to force upon us, that of serfs and slaves to the bigots of New England and their allies and friends.

"He who would thus work our ruin, would not hesitate to lead our troops into the ambush of the enemy, or by any other means in his power, short of taking the field as an open enemy, work our ruin.

"Therefore,

"*Resolved*, That we will hold all persons as enemies of this Confederacy, who shall by any means, depreciate the Confederate currency or shall refuse to receive it in payment of debts, and will use our best endeavors to bring all such to condign punishment by legal means, if the laws provide such punishment, but if not—to punishment with or without law.

"*Resolved*, That inasmuch as the Confederate Government has made its treasury notes a legal tender in payment for supplies for the army taken from the citizens by impressment, by compelling such citizens to receive them in payment for such supplies, and also in payment of its troops, we deem it both the duty and interest of the Government, as well with the view of sustaining its credit, as an act of impartial justice to all its citizens, to make such notes, by legislative enactment, a legal tender in payment of all debts.

"*Resolved*, That the proceedings of this meeting be sent to our Senators and Representatives, to the end that they may bring the subject before Congress, and either pass a law making the Confederate currency a legal tender, or a law inflicting severe punishment on all who shall endeavor to depreciate or lower its value.

"*Resolved*, That the Mayor and Council of the city of Macon are requested to appoint a Vigilance Committee, to be composed of twenty-five of our best and most substantial

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citizens, who shall be clothed with all the power of the city police, and whose duty it shall especially be to collect any and all facts they can, bearing on this subject, and bring the offenders to punishment.

*"Resolved,* That the Committee who shall be appointed by the City Council, collect as far as they can, the names of all persons in the city, who have refused to receive the currency in payment of debts due them, that they may be brought to the notice of the public and to punishment; (on motion of C. J. Harris) that any attempt tending directly or indirectly to depreciate the currency of the country, is unpatriotic.

*"Resolved therefore,* That during the continuance of the war, the attorneys of this city be recommended to reject all claims for suits, where the party plaintiff refuses to accept Confederate money in payment of the same."

On motion of J. Rutherford, Esq., the proceedings of this meeting were ordered to be published in the city papers, and all journals favorable to the objects of the meeting, requested to copy. The meeting then, on motion, adjourned.

T. G. HOLT, *Chairman.*

W. D. WILLIAMS, *Secretary.*

The following Committee was appointed by the City Council, in conformity with the above proceedings :

T. G. Holt, J. B. Ross, J. J. Gresham, Wm. B. Johnston, Charles Collins, J. W. Fears, G. M. Logan, S. T. Coleman, P. E. Bowdre, Thomas A. Harris, J. T. Boifeuillet, David Flanders, J. DeLoache, J. A. Ralston, E. L. Strohecker, Nathan Bass, G. T. Rogers, C. C. Sims, W. T. Lightfoot, Robert B. Barfield, George W. Price, W. Massenburg, A. Mix, J. H. R. Washington, Dr. M. S. Thomson.

#### EVIDENCE FOR DEFENDANTS.

P. E. BOWDRE testified that he was one of said committee; was present when Jones' case was acted upon, and never said there or elsewhere, that any one that refused to take Confederate money was a traitor.

Cross-examined, he said he had no recollection of ever

having made such statement; if he did, he must have been crazy. He said the object was to sustain the currency by bringing public opinion to bear in its favor.

GEORGE T. ROGERS testified that in the transactions with Jones, he was only accommodation endorser for his son, James G. Rogers, and was the same on other debts to a considerable amount; that afterwards James G. Rogers turned over to him a considerable amount of notes, accounts and stock in the Canton Copper-Mining Company, from which he had never realized anything; the stock of the Mining Company, was sold to pay the debts of the Company, and the assets so turned over are worthless; he never threatened complainant in any way for refusing to take the currency, or to make him take it.

CHARLES H. ROGERS testified that in May or June, 1863, he offered to pay Jones said debt in Confederate currency and also in cotton, which Jones refused to take; his recollection is that it was before the fall of Vicksburg.

Cross-examined, he said that up to January, 1863, he was Commissary Quartermaster in the Georgia Battalion in Virginia, and after that, was connected with the Commissary department of Macon under Captain Cunningham; was not in the army speculating; on one occasion, while in Richmond, Virginia, he bought a lot of tobacco and shipped it to Georgia for his father, in execution of an order from his father; never threatened Jones in any way for refusing to take the currency, nor to make him take it.

J. J. GRESHAM testified he was present when the matter of Jones' refusal was discussed; thinks it was at a public meeting; he did not take part in the discussion, and never acted as a member of the Vigilance Committee, and did not hear Jones threatened with any violence; the civil courts were then in full operation, but little business was done besides cases of *habeas corpus*.

Cross-examined, said he might be mistaken in saying the meeting was a public one instead of a meeting of the Committee.

WASHINGTON POE testified that the courts were open and

in operation in 1863, and ready to give protection to citizens in their rights of person and property.

C. B. COLE, (the Judge,) testified the first case of action against persons for refusing to take Confederate money, was that of Isaac Scott; it gave rise to the meeting in February, 1863; Scott had refused to take the currency, and persisted in his refusal after the meeting, and never did take it; but shortly afterwards, in defiance of public sentiment on the subject, Scott sold the notes of the Carharts at public sale; this he did contrary to the advice of witness and Colonel De-Graffenreid, who were his legal advisers; the sale was, as Scott stated, in order that Carhart could not file a bill asking the courts to compel him to take the currency; notwithstanding such refusal, no steps were taken to make Scott take the currency, by the Committee nor any one else, and no violence was ever done in consequence of Scott's refusal. Witness, about the same time, as an individual and as attorney for others, refused to take the currency and was not disturbed in person nor threatened with violence of any sort; he was not reported to the Committee, so far as he knew.

It was admitted that J. T. Nisbet, who was absent, would swear that, in 1863, he refused several times to take Confederate notes for absent clients, and that no injury was done him, nor any threats of injury to him made in consequence thereof, and this was considered as evidence.

T. G. HOLT (recalled by complainant), stated that Gresham was mistaken in supposing Jones' case was acted on at a public meeting of the citizens: it was at a meeting of the Committee.

The Court charged the jury that "if they believed, from the evidence, that complainant received from defendants the Confederate money in payment of said note, voluntarily and without any force or violence or threats from the defendants, or from any agency they had put in motion, they should find for the defendants; that if it was the purpose and intent of the Vigilance Committee to induce complainant to take the Confederate money from the defendants at par, by bringing public opinion to bear on him, and complainant, to avoid

this, agreed to take and did take it in payment of his notes, the payment was a good one; but if there was any force or intimidation used by defendants, or by any agency of the defendants, that would take away or destroy the free action of a man of ordinary firmness, the payment was not a good one; that they were the sole judges of the evidence and the weight they should give it, and should they be, by the evidence, satisfied that complainant was induced to take said currency by threats of violence, or by such menaces as would deprive a reasonably firm man of free voluntary action, then they should find for complainant; but if complainant took the currency in deference to public opinion, and without any fear of violence to his person or property, then the payment was a good one, and they should find for defendants.

The Court was requested to charge: "If the jury believe from the testimony, that James H. R. Washington and Robert B. Barfield, after meeting and conferring with the Vigilance Committee, advised the complainant that they did not consider it safe for him to refuse to take the Confederate money in payment, of defendants, that then the complainant had a right to act on such information, provided the jury should believe that said Washington and Barfield should have been men of ordinary firmness and intelligence."

The Court gave the request, with this qualification: "If the unsafety consisted merely in bringing public opinion to bear upon the complainant, and he acted voluntarily and in deference to public opinion, then he did not act under such duress as would avoid the payment made to him."

The Court further charged, that should the jury believe from the evidence and the law as given them in charge, that complainant was entitled to recover, they should deduct from the amount the value of the Confederate money he took at the time he took it, and if from the evidence they believed complainant had received from defendants usurious interest, they should also deduct the amount of such usurious interest.

The verdict was for the defendants, taxing them with half of the costs.

There is no assignment of errors in the record.



The bill of exceptions states that during the trial exceptions were taken on the following grounds :

Because the Court refused to allow an answer to said question propounded to Gabriel B. Roberts, as to his opinion of the danger incurred by refusing said currency.

Because the Court charged as aforesaid, and refused to charge as requested.

B. HILL for plaintiff in error.

LANIER & ANDERSON for defendants in error.

HARRIS, J.

1. If the complainant (Jones) in receiving the depreciated Confederate Treasury notes, in September, 1863, in payment of the note of the defendant, due before the war began, did so through the influence of public opinion brought to bear on his action by an association organized to persuade and impress men with a sense of public duty, or through the instrumentality of the press, appealing to the patriotic feeling of the citizen, in such case he could not and ought not to have relief in a Court. Such an act would be deemed voluntary. Conscious, as men of intelligence are, that individual example and moral power can, at most, accomplish but little in producing widely beneficial results, they almost instinctively resort to combinations of mind, wealth, character and position—aggregated, the scope and power of the association becomes the sum of the elements thus united—and knowing them, we are thereby furnished with a correct measure of the power it is capable of exerting. Acting within a legitimate sphere, exerted in the cause of education, charity, humanity—in the furtherance of a common public interest or policy—our experience demonstrates many beneficent results which have been accomplished by their agency.

2. But when such associations are formed, though with generous and patriotic ends in view, when the means they employ are unauthorized by law and coercive in their nature, when they combine avowedly, not by personal sacrifice and

individual example of each, or by persuasive appeals to the hearts and interests of the people to co-operate with them, but to *force* men by the awe and fear of personal punishment to yield to and comply with their will, then it is that such associations exert a baleful influence over the community in which they exist, depriving men of their freedom, and thus subverting law.

The case of complainant makes it necessary that we should seek through the testimony in the record to ascertain whether the act which he alleges to have been involuntary, is or not ascribable to the influence of an organization of the last kind above described, over his conduct.

Some case or cases having occurred early in the year 1863 of a refusal by a citizen of Macon to receive Confederate Treasury notes in payment of debts due to him, a call for a public meeting was made in the newspapers. A large number of the most respectable citizens of the place assembled, appointed a chairman and a committee, to report the sense of the meeting. The burthen of the report was an impassioned exposition of the momentous importance of sustaining the credit of the Southern Confederacy as vital to the success of its cause, and the report was accompanied by several resolutions, which were unanimously agreed to.

The report denounced as *enemies to the Confederacy* all persons who refused to receive its Treasury notes in payment of debts, and one of the resolutions pledged the meeting to the use of their best endeavors to bring all such men to condign punishment by legal means, if the laws provide such punishment. To this extent the action of that public meeting might have gone without transcending the limits heretofore stated, for it had an unquestionable right to unite in giving efficiency to existing laws.

There were, however, as must have been known to several distinguished legal gentlemen, who appear to have mingled their counsels with the other persons constituting the meeting, no laws of the Confederate or State governments which made the refusal to receive Confederate Treasury notes a crime, subjecting a person offending to *any punishment what-*

ever, none which branded him with the epithet of enemy or traitor. So far, then, as they thus engaged, there was nothing illegal, and with all the industry they might use, they could not assist in bringing any one to punishment by law, as there were no such laws to be violated. It could have served at best for only a scare-crow. But the meeting did not stop with that pledge, they went a step beyond—they boldly crossed the line which separates legality and illegality, persuasion and compulsion, not ignorantly nor unintentionally, but openly, knowingly and defiantly—they resolved *unanimously* that if the laws did not provide punishment, (for those who refused to receive Confederate Treasury notes,) *they would bring them to punishment without law.* Is there no menace, no threat in this? Is there not much more?

To give effect to the combined will of this meeting, it urged the City Council of Macon to appoint a Vigilance Committee of its best and most substantial citizens, who should be clothed with all the powers of the city police, and whose duty it should be to collect all facts they can bearing *on the subject*, and to bring *offenders to punishment.* After ordering the publication of its proceedings in the city papers, it disperses. The City Council take up the subject—it appoints the Vigilance Committee, and places its police at the service of the Committee. The spirit and purposes of the public meeting are transferred to the Vigilance Committee, which was created to carry into effect "the law" prescribed by the public meeting—the last is but the incarnation of the first. The public meeting had, so far as Macon was concerned, added by its legislation a new section to the Penal Code—it had created a *new* crime—its sanction was punishment, but indefinite as to kind or duration; we cannot gather from what they resolved whether it was fine, imprisonment, exile or death—this seems to have been left to the discretion of the Committee.

When we contemplate with some degree of minuteness the constitution of this body, we realize the establishment of an Inquisition of fearful proportions and powers, where each member is employed industriously in collecting the names of

all offenders against "the new law," all facts bearing on the subject. Membership implies an engagement to watch, enquire diligently, to be active and on the alert, to arrest and bring offenders to *punishment*. In fine, the duties imposed and undertaken are those of a police and espionage over the lawful and general business transactions of the city of Macon. This Committee is to exist during the war; it is invested with judicial and executive functions. It arrests the offender, or causes it to be done by the city police; it accuses; it prescribes its own sessions, its modes of procedure, its rules for admission of testimony, the quantity and quality necessary to determine guilt; it judges; it tries; it executes its own sentences. What element is wanting to make a body armed with or arrogating to itself such powers and functions, the most frightful of absolute despotisms?

It had its origin in the best impulses of patriotic hearts—of men who sought to accomplish what they deemed a great public good. But nothing was capable of greater perversion or could produce more injustice than the enforcement of its own requirement of compelling the receipt of Confederate Treasury notes at par in payment of all debts. It was not so intended, but it led to shameless wrong; it became, in fact, an invitation to those who did not feel the restraint of moral principle or conscience to put themselves out of debt at little cost.

Can it be wondered at that debtors will avail themselves of such opportunities, when supported by the weight of large and respectable bodies of men, who stand pledged to punish all persons who do not comply with *their will*? The men are rare who have physical and moral courage enough, though conscious of their rights, to defy such coercion; most men fear to encounter a hazard which is undefined, a punishment which cannot be computed. But we will proceed and see whether the compulsory power of this Vigilance Committee was brought to bear on Jones, and how:

The defendant, a member of this Committee, was indebted by note made before the war to Jones. When the Confederate currency had greatly depreciated, and stood relatively

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as fifteen of Confederate notes to one dollar in gold, he proposes to pay his debt in those notes at par. Jones refused. Rogers forthwith reported him to the chairman of the Committee, who convened it at an early day, and caused Jones to be summoned by a *police* officer to appear before it. Jones got suddenly indisposed, and begged a postponement of the meeting—the meeting assembled and adjourned over for a short period. In the interval, about an hour before the Committee were to assemble, Jones met with Mr. Charles Collins, a member of the Committee, who told Jones to take the money, and “that if he did not, he would be published to the world as a traitor.” Jones, instead of attending the meeting, went and saw Mr. Washington, another member of the Committee, and put into his hands, and that of Mr. Barfield, also a member, the matter. The Committee convened. “There was very strong feeling exhibited in the meeting against Jones for refusing to take the money;” “some of the Committee were violent in their denunciations;” “thinks Charles Collins was one of the most violent;” “thinks Charles Collins said then, or shortly before that, if the complainant would not give in and take the currency, he ought to be published as a traitor, or words to that effect.”

Seeing the temper of the meeting, and being of the opinion that a majority were adverse to Jones, Washington and Barfield agree that Jones shall receive the currency, saying to him when reporting what they had yielded to, that they *deemed it a great outrage to his rights*, but that they thought that it would not be *safe* for him to refuse. Upon this he takes the Confederate Treasury notes and gives up to Rogers his note.

Without an abuse of language, can it be said that he did this voluntarily?

Interpreting from common sense the conduct of Jones, can any believe that he was sick when asking the meeting to be postponed—why not attend the adjourned meeting? Who does not perceive in these facts the influence of fear, especially when his interview with Mr. Collins, just before the meeting

of the Committee, is kept in remembrance? That fear was increased by the reports by Washington and Barfield—they thought and said to him that it would not be *safe* for him to refuse to receive the currency. Everything from first to last was minatory, and their opinions were rational, were founded upon what had occurred. Punishment of some kind for refusal was threatened by the resolutions—Jones had been notified to appear before the Committee—a Committee-man had said to him that if he did not take the money he would be published to the world as a traitor. Would it not have been punishment? Is it nothing to be pilloried in a newspaper, to be held up to scorn, to odium? Would not such a publication (libelous though in law it would have been, and indictable,) have been an invitation to the public to join in the hue and cry of denunciation against him? Would it not, moreover, looking to the time when threatened, most probably have endangered his personal security? The city was filled with Confederate soldiers on furlough, or convalescent, or on post duty, and nothing could have been better conceived to have aroused their passions against Jones than to have denounced him through the newspapers as a traitor to the cause in which these soldiers were devoting their lives.

3. This case presents such clear and impressive facts, all converging to a focus, that we cannot avoid their logical force. They demonstrate that duress by threats and menaces of punishment were exerted knowingly and intentionally to compel Jones to surrender his will to the will of the public meeting and Vigilance Committee, and that under the influence of just and reasonable fears inspired by such action upon him, he involuntarily complied with what he deemed an outrage upon his rights.

We notice in the testimony that the highly-esteemed chairman of the public meeting and Vigilance Committee was permitted to give his understanding of the purposes and power of the Committee. This seems to us to have been clearly inadmissible. The preamble and resolutions of the public meeting do not seem to us to be ambiguous; on the contrary they are very explicit, and interpret themselves; be-

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sides they are in writing, and necessarily are the best expositors of the sense of those who agreed to them.

Again, we perceive that several witnesses were examined to prove that they had refused to receive Confederate Treasury notes, and that they had not been reported to and arraigned before the Vigilance Committee. Such testimony was impertinent to the matter under investigation, and should have been excluded—the enquiry was, whether duress by force or threats had been used to coerce Jones to receive *contrary to his will* Confederate Treasury notes at par in payment of the note of Rogers?

We send the case back, that upon the new trial the charge of the Judge may distinctly submit to the jury the views herein stated.

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JOHN H. NEWTON and JOHN J. M. McCULLOUGH, plaintiffs  
in error, vs. JOHN M. BAILEY, defendant in error.

NOTE. WARNER, C. J., did not preside in this case.

1. A Justice, before issuing an order for bail in an action for slander, need not hear evidence *pro* and *con*, but should so far examine the pleadings and other matters connected with the suit, as to enable him to fix the amount of bail.
2. The Court, on the trial of *scire facias* against the bail, cannot enquire whether the amount of the bond was onerous.
3. The Court, during the progress of the suit for slander, could reduce the amount of bail upon defendant's application.
4. Though the bond be not technically formal, if the recitals in it sufficiently show that it was taken as the bail bond in that case, the security can take nothing by this informality.
5. To fix bail, the *casa* may be returned before the next term after it was issued.

*Scire facias.* From the Superior Court of Jackson county.  
Tried before Judge HUTCHINS. February Term, 1867.

John M. Bailey brought an action for slander to August Term, 1859, of said Court, against John Horton.

Pending the action, Bailey made before D. L. Garrett, a Justice of the Inferior Court of said county, an affidavit, alleging "that John Horton, of said county, is justly indebted to him in the sum of five thousand dollars in said case, for slanderous words spoken by said John Horton concerning said deponent; and that at the commencement of said action deponent did not require bail, and that deponent has reason to apprehend the loss of said sum or some part thereof if the said John Horton be not held to bail." Thereupon said Justice issued an order to "the Clerk of the Superior Court and the Sheriff of said county," commanding the Clerk to issue bail process for ten thousand dollars, and the Sheriff to execute the same. The Clerk issued ordinary process, without any order for bail. On the 11th January, 1861, the Sheriff arrested Horton, and took from him (and John H. Newton, Green R. Duke and John J. McCullough, as his securities,) a bond to pay the eventual condemnation money or render his body to prison.

At February Term, 1866, Bailey obtained judgment against Horton for \$300.00 and costs. *Casa* issued against Horton 23d June, 1866, and a return of *non est inventus* was made only two days thereafter.

*Scire facias* against the said securities was issued, returnable to August Term, 1866.

At March Term, 1867, the *scire facias* was amended by an allegation, that at the time it issued Green R. Duke was dead, and that twelve months had not elapsed since the grant of letters of administration on his estate.

At February Term, 1867, attorneys for Bailey moved judgment upon the *scire facias*, and introduced the records and papers establishing the facts aforesaid.

Defendant's attorneys resisted the motion on these grounds:

1st. That the bond was joint, that Duke was dead, and his representatives should be a party.

2d. Because the *casa* was returned prior to the term of the Court at which it was returnable.

3d. Because the bond is not a bail bond, it is a mere private contract between the parties, and has no connection with



- any bail process, nor refers to any proceeding for bail, and if defendants are liable on it, it must be by suit.

The recital in the bond is, "Whereas, a civil suit in an action for words is now pending in Jackson Superior Court, at the instance of John M. Bailey, against John Horton, for the sum of \$5,000.00. Now, if Horton fails to appear or pay eventual condemnation, the said securities will pay the amount of the judgment obtained in said case and the costs for him."

4th. Because for bail in actions *ex delicto*, the Judge upon hearing the facts, is to fix the amount of bail, but the Judge did not examine the facts, but permitted plaintiff to fix the amount.

5th. The bail is excessive.

The Court overruled the objections, and allowed judgment to be entered against the defendants in *sci. fa.* Defendants assign this action of the Court as error.

JUNIUS HILLYER and LAMAR COBB for plaintiff in error.

L. P. THURMOND, (represented by W. HOPE HULL,) for defendant in error.

HARRIS, J.

Pending the action of slander, plaintiff below made his affidavit and applied to a Justice of the Inferior Court for an order to hold the defendant in the slander suit to bail. It was granted. The plaintiffs in error became bail for defendant below, and now when it is sought to charge them by *sci. fa.*, they except to the order granting bail, the amount, etc. The power used by the Justice in granting bail, in cases sounding in *tort*, is conferred by statute. The affidavit, whilst it is perhaps not in as clear a form as it should have been, is distinct enough to furnish a foundation for the order to hold to bail. See *Montigue vs. Leatr.* 7 Ga., 366.

1. The objection that the Justice did not hear the facts previous to fixing the amount of bail, is assumed and supported by no testimony in the record—but we do not under-

stand that such direction to the person applied to for the bail order was ever meant to require the officer to hear testimony *pro and con*—indeed, enter upon a miniature trial involving the supposed merits of the case, probabilities of recovery of damages and their amount, but an enquiry sufficiently wide into the pleadings and other matters connected with the suit as would furnish him with *criteria* or means of fixing with fairness the amount of bail.

2. We cannot go behind the judgment in this case on *sci. fa.* to pronounce upon the question raised as to what should have been a proper amount. See *Gilmore vs. Lidden*, 23 Ga., 14.

3. The defendant in slander, during the progress of the suit, could have applied to the Judge of the Superior Court to reduce the amount of bail required and given, and we make no doubt that the Court would have reduced it if the case properly authorized the reduction. This objection comes too late.

4. But it is alleged that the bond in this case is not a bail bond, but a mere private contract between the parties, and that it has no connexion with the bail process, etc. It may be conceded, too, that this bond, like the affidavit, is deficient in form, yet it recites the pendency of the suit in Jackson Superior Court for words against Horton and for the recovery of \$5,000.00, and to it is a condition for the appearance of Horton, or the payment of the eventual condemnation money, or judgment obtained in the case, etc. Is not its connexion with the bail process and the suit *for words* sufficiently shown by these recitals to authorize us in treating this bond as a paper in the case?

“*Id certum est quod certum reddi potest*,” is a trite old law maxim, but furnishes in itself a full answer to the last objection we have noticed. See *Deboard vs. Brooks et al*, 28 Ga., 365.

Objection was also made as to the return of the *casa* into office before the full period of time between the Courts had elapsed.

To fix bail, this is allowed. See Code, Sec. 3349.

The case in all respects is against plaintiff in error.

Judgment affirmed.

HENRY T. SMITH, *et al.*, plaintiffs in error, vs. BOYKIN R. SMITH, defendant in error.

Specific performance of a contract in writing and under seal, made for and in behalf of minors, by an adult friend, with a brother who has attained his majority, as to the terms upon which their father's property shall be divided, will be decreed against such adult brother.

The doctrine of the *want of mutuality* in the agreement in this case does furnish the correct rule for the decision of the case made by the record.

Bill for specific performance. Demurrer. Decided by Judge WM. M. REESE, presiding for Judge AUGUSTUS REESE, Jasper Superior Court, April Term, 1867.

William G. Smith died in 1864, leaving as his heirs at law Henry T. Smith, Martha Penn, Thomas Penn, Russel Penn, Henry F. Penn, and Salina Penn, minors; Charles H. Thompson, Alice Clark and Emma Clark, minors; Kesiah Smith, widow of Henry G. Smith, deceased, Georgia Nixon, wife of Jesse F. Nixon, and Boykin R. Smith. His estate of realty and personalty was worth one hundred thousand dollars, or other large sum, at his death.

For some weeks after his death the heirs were in doubt whether he died testate or intestate. Boykin R. Smith knew that a paper called a will had been executed by deceased about a year before his death. Boykin R. Smith was officious in getting it up, and drew the instructions from which said Jesse F. Nixon drafted the same. By it said Boykin R. was to be almost the sole legatee. What had become of that paper none of the parties knew. The estate was without a legal representative. In some way the parties learned that said paper had existed, and the provisions of it, and frequently discussed them.

In these discussions Henry T. Smith, in presence of said Boykin R. Smith, denounced said paper as a fraud upon the deceased and his heirs, declaring that it was made under the dictation of said Boykin R., who had taken advantage of the weakness of deceased to impose upon him when he was in his seventy-ninth year, paralyzed and imbecile in body and mind, and perfectly pliant, and had fraudulently induced

said deceased to give to him nearly his entire estate. Henry T. Smith further declared that he was unalterably determined to oppose the probate of said paper as the will of deceased, should it ever be found and offered for probate.

After some weeks, said paper still being lost, and it appearing that the said estate would pass under the acts of distribution, said Boykin R. became anxious to hold certain specific property, which he pretended had been given to him by proper deeds, conveyances, and bills of sale, made by deceased.

If such deeds, conveyances, and bills of sale were ever made, they were not out of the possession of deceased, nor was the possession of the property covered by them ever changed from deceased to Boykin R. Deceased had kept both the writings and the property, and Boykin R. had not claimed the property during the life of deceased, nor since his death. Boykin R. knew these facts, and that his said claim was at least very doubtful. Still it seemed probable that he would be compelled to take a smaller part of said estate than he would get under said pretended will, and he preferred these specific things to his share upon a distribution of the estate. Knowing that if the pretended will were found and offered for probate it would cause a law suit and a family difficulty, and that his imposition and undue influence in obtaining it were true, and the paper an outrage upon the others of the family and unjust in its discrimination, in order to secure said specific property said Boykin R. proposed that the estate should be distributed by agreement of the parties at interest, thereby saving expense, avoiding litigation, and preserving peace and harmony.

There were no debts to be paid, and the parties all consented so to divide the estate, by agreement, as follows:

GEORGIA, JASPER COUNTY.

We, the legatees and representatives of legatees of the estate of William G. Smith, Sr., deceased, met on the 16th day of November, 1864, for consultation in regard to the settlement and distribution of said estate, do severally consent and agree that B. R. Smith have certain negroes, deeded

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to him by his father when said B. R. was quite young, and their increase up to the time when B. R. became twenty-one years of age; that he is to have a certain tract or parcel of land in the County of Newton, known as the Evans place; then said B. R. is not to draw any more from said estate until the other legatees are made equal with him, except the Perry tract of land, jack, goats, buggy and harness, which said B. R. claims as his own property, purchased by himself; also, two negroes hired from Thomas Smith's estate, and half of all the provisions raised the present year, as compensation for his own and his wife's hands.

We further agree that the taxes are to be paid out of the estate; that the physician's bills for the estate negroes are to be paid out of the estate, (the said B. R. Smith paying his own physician's bill, and also that of the negroes held in right of his wife.)

We further agree that the bond made by the said B. R. Smith and Wm. G. Smith, to be paid by the estate, to wit: bond to the Confederate Government; and that the one-half of the receipts for the same to be paid by the said B. R. Smith, and that the other half, together with all other property, not herein before specially conceded to said B. R. Smith, be divided between the widow and the other legatees, agreeably to the law or laws in such cases made and provided.

We further agree that this be a final basis of settlement between all the parties as aforesaid, as witness our hands and seals.

W. G. SMITH,  
J. F. NIXON, for ALICE  
and EMMA CLARK,  
H. T. SMITH,  
KESIAH SMITH,  
WILLIAM C. PENN,  
WM. H. THOMPSON, for  
C. H. THOMPSON,  
J. F. NIXON,  
B. R. SMITH.

All the heirs, personally or by attorney, signed said agreement. Before and after it was signed, Boykin R. repeatedly said that the pretended will was inequitable; that this agreement was equitable and just; and that by it he intended to prevent forever any chance of dispute about said pretended will.

In pursuance of said agreement, said heirs at law appointed Charles F. Campbell, Robert Barnes, Benjamin T. Digby, Henry Walker, and Elbert Gay to appraise and then distribute the property of said estate according to said agreement.

On the — day of —, 1864, said commissioners met for the purpose of performing said trusts, &c., and proceeded till so embarrassed in adjusting the shares on an equitable basis, (on account of the great difference then in nominal value between prices then and before the war,) they determined that the best mode of equalizing the shares according to said agreement, was to sell the entire property, except what had been by the agreement specifically allotted to Boykin R. Smith.

Accordingly, cattle, corn, fodder, oats, and other perishable property, was, after due advertisement, sold for \$70,000.00, or other large sum, which was paid by the purchasers to the commissioners.

A few days after said sale, when complainants and other purchasers went to take the property which they had bought at said sale, they were told by said Boykin R. that he had found said pretended will, and that he claimed all the property which said paper conferred upon him under the aforesaid family settlement and compromise, but would set up the said paper as a will and claim under it.

The commissioners refused to go further, and at once turned over to said Boykin R. the proceeds of said sale, and all the other property of the estate, which consisted of one hundred and fifty head of hogs, twenty cows and calves, fifty head of sheep, ten horses and mules, forty negroes, twenty bales of cotton, three hundred barrels of corn, one hundred bushels of peas, one hundred bushels of wheat, thirty thousand

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pounds of fodder, farming tools and implements, household and kitchen furniture, worth \$300.00, and proceeds of a sale of a lot of whiskey. All of said property and the lands of deceased are held by Boykin R. and Kesiah Smith, in disregard of said agreement.

Upon these allegations in their bill, the other heirs claim that Boykin R. Smith is trustee for them, and pray that by him, said Kesiah, and said Jesse F. Nixon, said agreement be specifically performed, and for discovery and account, and such further and other relief as is equitable.

Said defendants demurred. The grounds of demurrer were: Because complainants had not made such a case as entitled them to discovery and relief; and because Kesiah Smith and Jesse F. Nixon and his wife, Georgia Nixon, are improperly made parties defendant, as no discovery or relief is sought from them; and because the remedies of complainants are complete at law; and further, because no one has the right to receive the property except a legal representative. No consideration is alleged for said contract or agreement, and all the parties in interest have not signed the same; because the proceeds of the sale went into the hands of complainants' agents, and as by the agreement the property is to be distributed according to the law, it must be distributed under the will, which is the law in this case controlling the distribution.

Upon the hearing, the Court sustained the demurrer and ordered the bill dismissed.

The plaintiffs in error assign this order as error.

W. A. LOFTON and JUNIUS WINGFIELD, for plaintiffs in error.

J. J. FLOYD, GEO. F. BARTLETT, and W. W. CLARK, for defendants in error.

HARRIS, J.

The general demurrer in this case was sustained by the Court below on the sole ground that "there was a want of mutuality in the contract sought to be specifically enforced." This decision appears to us to be the result of a mistake of the facts. All the parties signing the agreement for the division of the property are *adults*, none are minors. Thus, these are unquestionably parties capable of contracting with each other, and who do actually contract. That some of the parties contracting did so in behalf of minors, and to promote their interest, furnishes in Equity no just ground for refusing to enforce the agreement. They are doubly liable by their action—they are liable to defendants and they are liable to the minors—and this liability to defendants is, of itself, a refutation of the idea that there is no mutuality.

But had the facts been as the Judge supposed them to be, and as they were argued to be here by the counsel of Boykin R. Smith—that is, that "the agreement" was made with minors by him—we do not perceive how that would affect the mutuality of the contract, though it might affect the mutuality of remedy. To say, in such a case, that there is no mutuality of contract, because it was made with minors, is to assert such a contract as absolutely void. See Reeves Domestic Relations, 243, 249. Few, very few contracts, (and those chiefly on grounds of public policy) made by minors, are by law declared *void*; most of the contracts of minors are merely *voidable*, and within this latter division would "the agreement" here fall. This distinction of the contracts of minors into void and voidable, was first clearly marked out by Lord Mansfield, in Touch vs. Parsons, 3 Burrows Reports, and it has been acted on in England and America ever since as law.

If "the agreement" is voidable, at whose instance? Certainly, unless for fraud or mistake, not by Boykin R. Smith, but by the minors. And when? The law gives them until after they have attained their majority, to confirm or repudiate it at *their election*. The adult B. R. Smith continues bound during the interval, and properly—it was his volun-



tary act to enter into the agreement, and if he made it with minors, there is, there should be, no escape for one who treats with minors, knowing them to be such—he treats with a presumptive knowledge of the protective principles of law made in their behalf.

So that whether “the agreement” was made with adults or minors, it is binding on Boykin R. Smith, if it is founded on a sufficient consideration.

What has been said disposes of the question of mutuality in the contract, or, in other words, that one party cannot be bound where the other is not, by shewing that to “the agreement” here there are competent parties who are bound to each other by its provisions.

There is, however, a want of mutuality spoken of in the books which does not go to the destruction of the contract, but it furnishes simply a rule of practice or ground upon which chancery will take jurisdiction to grant specific performance or enforce agreements. This is termed mutuality in remedy. This question arises most frequently in that large class of cases growing out of the transactions of vendors and vendees. It is often made the criterion in determining whether equity will take cognizance of the case or not—thus, if it should appear that the remedies are alike and mutual, specific performance will be decreed; if not, it declines jurisdiction, and turns a party back on his rights in a court of law for damages or compensation. See *Willings vs. Cottal*, 1 *Simons & Stuart*, 174; *Adderly vs. Dixon*, 1 *Simons & Stuart*, 607.

It is very important to guard against confounding want of mutuality in the contract and want of mutuality in the remedy. In the case under review we think both exist.

Is the agreement on *consideration*?

It purports to be under seal; the solemnity of a sealed instrument imports consideration, or, to speak more accurately, it estops a covenantor from *denying a consideration*, except for fraud. It is upon this principle that Courts of Equity decree payment of voluntary bonds. 1 *Fonblanque Eq. Ch.* 5 Note A; 3 *Peere Wm. Repts.*, 222.

Compromises of doubtful rights are upheld by general policy, as tending to prevent litigation, in all enlightened systems of jurisprudence. 3 vol. Burge Com., 742; Pickering vs. Pickering, 2 Beavan, 56; Naylor vs. Winch, 1 Simons & Stuart, 565.

Much more readily will Courts of Equity give effect to agreements of compromise of conflicting claims, especially *when they partake of the nature of family arrangements*, as will be seen by an examination of the cases hereinafter cited. See Batten on Contracts, p. 70, and cases there cited.

The earliest case, perhaps—certainly the leading case on the subject of *family agreements*—is that of Stapleton vs. Stapleton, 1st Atkins' R. Lord Hardwicke says: An agreement entered into upon a supposition of a right or of a doubtful right, *though it afterwards comes out that the right was on the other side*, shall be binding, and the right shall not prevail against the agreement of the parties.

The compromise of a doubtful right is a *sufficient foundation* for an agreement.

Where agreements are entered into to save the honor of a family, and are reasonable, a Court of Equity will, if possible, decree performance of them. "From this decision down to the present day, says Chancellor Sugden, in *Westby vs. Westby*, 2 Drury & Warren, 503, (cited in 2d White & Tudor, Eq. cases, in notes to *Stapleton vs. Stapleton*,) the current of authorities are *uniform*, that whenever doubts and disputes have arisen with regard to the rights of different members of the same family, and fair compromises have been entered into to preserve the harmony and affection, or save the honor of the family, those arrangements have been sustained by Courts of Equity, *albeit perhaps resting on grounds which would not have been satisfactory if the transaction had occurred between mere strangers.*"

The Court will not enquire into the adequacy or inadequacy of the consideration. It is *enough to support the agreement* that there was a doubtful question, and a compromise fairly and deliberately made upon consideration, and the actual rights of the parties, whatever they might be, cannot

affect the question. Per Sir John Leach, V. C., in *Naylor vs. Winch*, 1 S. & S., 565.

In the same case, the Vice Chancellor also said: "In doubtful questions, such as upon the construction of a will, it is extremely reasonable that the parties should terminate their differences by dividing the stake between them in the proportion which may be agreed on."

In *Neal vs. Neal*, 1 Keen, 672, Lord Langdale sustained an agreement in *parol* as to a partition of lands devised to two brothers, saying, "Looking at this case with reference to those principles deducible from the cases cited at bar, he was of the opinion that the agreement here, though by *parol*, as it was *in the nature of a family arrangement*, was an agreement which the Court would enforce."

The obligatory character of these family agreements is illustrated in the case of *Pullen vs. Ready*, 2 Atkins, 587. The agreement in this was between brothers and sisters, founded upon the assumption that all were entitled under a will. Lord Hardwicke enforced the agreement, as there was a neglect on the part of those complaining in acquainting themselves with the facts and legal consequences of them.

In *Stockly vs. Stockly*, 1 Vesey & Beam, 30, Lord Eldon recognizes fully the doctrines of *Stapleton vs. Stapleton*, *Pullen vs. Ready*, and quotes in his judgment the case before Lord Hardwicke, of *Corry vs. Corry*, 1 Vesey, Sr., p. 19, which was an agreement to settle family disputes, the agreement being reasonable, though one of the parties was *drunk at the time*. This was an agreement between a *son tenant-in-tail* and his *father tenant-for-life* on something for the benefit of minor children; though the son complained of paternal authority having been exerted, which was true, yet as the *agreement was reasonable*, the Court not only would not set it aside, but actually enforced it.

Lord Alvanly, in *Gibbons vs. Caunt*, 4 Vcs., 840, speaking of mere agreements of compromise between others, *not family arrangements*, uses this strong language: "If parties will, with full knowledge of the doubts and difficulties as to their rights, act upon them, though it turns out that one gains a

great advantage, if the agreement was *fair and reasonable at the time*, it shall be binding."

The cases cited abundantly establishes the position, that in Equity the *termination of family controversies furnishes a sufficient consideration* to support agreements for such purpose, and that its powers will be fully and readily used to enforce them.

It appears from the bill of Henry T. Smith *et al.*, that the agreement for the division of the estate of Wm. G. Smith was a fair and reasonable one; indeed, so far as defendant, Boykin R. Smith, is concerned, he gets a very decided advantage in securing title to property he claimed, which otherwise would be a subject of controversy. This agreement, according to a decision of this Court in the case of Moore vs. Gleason, 23 vol., 144, amounted to a reduction and possession of each child of his or her share. It is difficult to regard the agreement here in any other light than as executed at least in part—the appointment of commissioners by all the parties to sell and divide, and the actual sale made of all the property except the share of said Boykin R. Smith, which was paid to him in kind, all strengthen the idea. Besides, he has arrested the payment of the shares of the other children, and required of and received from the commissioners the proceeds of the sale in which he has no property. Has he not by his conduct made himself as to the funds in his hands a trustee to and for the use of the other parties to the agreement, and, as such, liable to account? We leave, however, this point open for decision below. In conclusion, we say that the waiving of the advantages he had by the will of his father—with a knowledge of its provisions—at the time he entered into the agreement with his brothers and sisters, with a view to family harmony, furnishes a *sufficient consideration*, without anything else, for the agreement; that he, the said Boykin, is *estopped by said agreement* from claiming anything through the will of his father—and there being no creditors of the testator concerned, the will ceases to be the law of distribution as to all who are parties to or claim through the agreement. The agreement has *as to them* become the law

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for the distribution of the estate of Wm. G. Smith, and should be enforced.

Judgment reversed.

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ELIAB W. WELLS, administrator of JAMES WILDER, plaintiff  
in error, vs. MARY C. WILDER, defendant in error.

NOTE. WARNER, C. J. did not preside in this case.

The laws of Georgia allow a widow one year's support for herself and minor children out of the estate of her deceased husband. They do not contemplate that she shall live at the homestead and consume the provisions belonging to the estate, and have a year's support also allowed.

Whenever the widow applies for an assignment of the year's support, she must be charged with the value of what she previously consumed.

Twelve months' allowance to widow and children. Tried before Judge SPEER. Pike Superior Court, April Term, 1867.

This case stood for trial in said Court, on appeal from the Court of Ordinary. It was an application for "the twelve months' allowance for the support of widows and children."

It was caveated by plaintiff in error.

The testimony was as follows :

MARY C. WILDER (the widow applying,) said : James Wilder left six children, four of them minors, three living with me. He had nineteen slaves, four hundred and five acres of land, and considerable personal property. He died January, 1865.

Myself and children have worked hard for a support since his death. Until administration was had, we lived on the estate, (farm) and used what was left there ; most of the corn and meat was taken from me. I do not know whether the estate is solvent ; it was at the death of my husband.

I sold a horse to pay Dr. Caldwell's bill for medical attention ; I sold a mule to get corn to live on ; I got \$140.00

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worth of corn—I disposed of none of it to my son or son-in-law—I was forced to buy corn to keep the stock from perishing. I injured my hand while working to try to keep from selling the stock ; my hand is now disabled, and I fear permanently so. Twelve months after husband's death, caveator applied, as a creditor, to me, about his debt ; I could not have kept the stock alive without selling the mule ; as I could get money for my work, I paid it for the first twelve months. Cannot say how much money I borrowed—more than \$100.00. I cannot say how much provisions my husband left, most of it was taken by the soldiers passing by.

The following return of the Commissioners was read in evidence for applicant :

“ We, the undersigned, appraisers appointed by the Court of Ordinary of Pike county, to appraise and set apart a sufficiency of the household and kitchen furniture for the use of the widow and minor children of James Wilder, late of said county, deceased, and to appraise and set apart twelve months support for said widow and children, do appraise and set apart all the household and kitchen furniture on hand for the use of said widow and children, viz :

2 Cows and Calves.....	\$ 50 00
1 two-horse Wagon.....	75 00
30 bushels Wheat.....	60 00
3 pair Plow Gear.....	4 00
1 Corn-Sheller.....	12 00
1 bay Mare.....	150 00
2 Mules.....	275 00
1 Buggy.....	20 00
15 head stock Hogs.....	50 00
5 head of Sheep.....	7 00
1 Cutting-Knife.....	8 00
Cash to be paid out of estate.....	289 00
	<hr/>
	\$1,000 00

“ We, the undersigned appraisers, agree that it will take the foregoing for the widow and minors' support for one year.

ROBERT H. ALLEN,  
 (Signed) W. B. BALLARD,  
 L. J. GREEN, J. P.

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"I do certify that the appraisers were sworn to do their duty according to law.

(Signed)

L. J. GREEN, J. P."

The testimony for caveator was as follows :

Dr. J. CALDWELL sworn, said : Deceased left a good many negroes at his death, a widow and at least four children. I can't say what is a reasonable support for such a family. I got a horse from the estate, paid \$250.00 for it. My medical bill was \$246.00. I tried to get the horse from Wilder in his lifetime, he always refused to sell him, said he intended the horse for his wife. I allowed her \$288.00 for the horse.

Wilder was sick two or three months before his death ; other members of the family were sick ; the main portion of the bill was for Wilder's last sickness. Wilder was a good provider for his family, lived well, in as good style as is usual in the country. Provisions were high about the time and after his death. Soldiers cut down a good deal of the corn the fall before he died in January. Another raid passed after his death. Plaintiff was obliged to buy corn after the corn was taken from her. She has worked hard since her husband's death to support herself and children. In the style in which her husband lived, I do not think \$1,000.00 an unreasonable year's support for herself and family. At present prices it would not support them a year. The style of living has changed since the war—half (of what was heretofore spent) is not spent by families. Living is much higher than before the war. The estate is insolvent. Wilder was in bad health several months, then was taken very ill, and lived only five or six days ; for the last five days my services were worth \$50.00. I stayed with him day and night.

E. W. WELLS, caveator, testified : I am administrator of James Wilder's estate. The estate is appraised at \$1,653.50. It is insolvent. I can hardly say what would be a reasonable support for the family for twelve months. I think by economy they could live on \$500.00. The estate is under mortgage.

The amount in money awarded by the commissioners to the widow would exhaust the sales of the perishable property, (except what was given her,) and leave only seventy-seven dollars balance in hand arising from this source. The widow has taken her dower, 168 acres of land. It will take all the estate to pay the widow's allowance. If anything is left, I have the oldest claim, and will get it. I have two claims, one older than the mortgage. The actual property set apart for the widow is, by appraisement, valued at \$400.00, the money at \$289.00, making near \$700.00. I think the property is worth the value the commissioners put upon it in setting it apart for the widow. The property sold did not bring the prices it was appraised at.

F. DISMUKE, sworn for applicant, testified :

The widow, in her support, after her husband's death, got means outside of the estate. I know of her borrowing some. The land is worth all it is appraised at. The dower is run off on the old land of the estate. The amount set apart by the commissioners will not support the widow and family for twelve months as she lived before her husband's death. It is more expensive to live now than before the war. The appraisement had included the whole property. Mrs. Wilder paid her husband's funeral expenses.

The evidence being closed, counsel for caveator contended, among other things, that the act of 15th December, 1866, "to define and regulate the laws governing the twelve months' allowance for the support of widows and children," was not applicable to this case. The Court charged the jury that said act did apply to this case, and that Mrs. Wilder was entitled to twelve months support from the date of the letters of administration on said estate.

The verdict confirmed said allowance by said commissioners, and judgment was entered accordingly.

The errors assigned by the bill of exceptions are—

1st. Because the Court erroneously held said act of the General Assembly constitutionally applicable to this case; and



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2d. Because the verdict was contrary to law and the evidence.

J. Q. A. ALFORD and COBB & JACKSON, for plaintiff in error.

H. GREEN, BOYNTON & DISMUKE, and DOYAL & NUNALLY, for defendant in error.

HARRIS, J.

As some of the material facts in the record are very indistinct, we send this case back, that it may be submitted to a jury under a charge of the Circuit Judge, to this effect: That the laws of Georgia allow a widow one year's support for herself and children out of the estate of her deceased husband; that the laws do not contemplate that she shall live at the homestead and consume the provisions belonging to the estate and have a year's support *in addition to what she may thus have consumed*, allowed to her; that in all applications for a year's support to be assigned her, she must be held chargeable with the value of what she had previously consumed. The last act of the Legislature does not change the rule laid down in the opinion of Chief Justice Lumpkin, in case of *Blassingame et al. vs. Rose*, 34 vol., p. 418, Ga. Repts., nor do we consider that act as violative of the clause of the State Constitution against retro-active legislation—for the right to a year's support was conferred previous to the rendition of plaintiff's judgment.

DOE, *ex dem.* of ELISHA M. KING, plaintiff in error, *vs.* ROE, *cas. ejector*, and J. D. LEEVES, tenant, defendant in error.

Where a *tenant-for-life* in land, holding under the will of her deceased husband, conveyed the *entire estate* in fee simple, by deed of bargain and sale, prior to the adoption of the Code: Held, that by the common law of force in this State, she forfeited her life estate in the land, and gave to the remainder-men the *right of entry thereon*—and that the the purchaser of the entire estate, and those claiming under him, holding possession thereof under color of paper title for seven years from the date of such sale, will be protected by the statute of limitations against the remainder-men, although seven years had not elapsed from the death of the tenant-for-life.

1. At Common-law a feoffment, fine or common-recovery, by a life-tenant forfeited the estate to the next taker. WALKER, J.
2. A bargain and sale or lease and release of the fee by a tenant-for-life, did not work a forfeiture, but the bargainee or releasee took such interest as the life-tenant had a right to sell. WALKER, J.
3. The old doctrine of forfeiture by alienation of a greater estate than that owned and possessed by the tenant, was never incorporated into, nor became a part of the law of this State. WALKER, J.
4. If a tenant-for-life forfeit his estate to the remainder-man by alienation, the remainder-man then has two titles,—the one by forfeiture and the other in remainder; and he may enforce either at his option, within the time prescribed by the statute of limitations. He may be barred as to one title, and yet recover upon the other. WALKER, J.

Ejectment. Tried before Judge AUGUSTUS REESE. Jones Superior Court. October Term, 1866.

This was ejectment on the single demise of Elisha M. King, for one-fifth interest in the plantation in Jones County, owned by George Broach at his death, containing about four hundred acres, the boundary of which is therein given.

There was a count for mesne profits.

The plaintiff introduced the will of George Broach, dated 18th November, 1841. By the 2d item of said will, George Broach gave to his wife, Rachel Broach, all his lands in Jones County, containing eight hundred and thirty-seven acres, of which the land sued for is a part.

The 5th item of the will is as follows: "It is my desire

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that my beloved wife, Rachel Broach, shall have full power to dispose of a part or all of the above described property, in any manner she may think proper, and enjoy it in any way she may think fit, during her natural life; and after her death, I wish it equally divided between my beloved children, Robert Broach, John Broach, Hamilton Broach, Mary Ann Broach and Calvin Broach."

Rachel Broach and Robert Broach were nominated therein executor and executrix. Plaintiff proved that Elisha M. King married the widow of John Broach, a son of the said testator, and that John Broach survived his father and was married at his death, and in 1852 himself died, leaving no heir except his widow. Plaintiff proved that during the years 1861 and 1866, the value of the one hundred and fifty acres of arable land, for rent, was one dollar and a half per acre *per annum*; and it was agreed that for the intermediate years, the rent was worth fifty dollars *per annum*.

Plaintiff next read in evidence a deed, made 3d April, 1852, by Rachel Broach as said executrix, in pursuance of the will and an order of the Court of Ordinary, conveying the entire estate in the premises in dispute, to Alexander H. Broach, his heirs and assigns; and a deed made the 12th November, 1860, from A. H. Broach to George D. Leeves, to the premises in dispute; and also the order of the Court of Ordinary, at March Term, 1852, authorizing said executrix to sell said property "at private sale or in such manner as will most conduce to the interest of the heirs and creditors of said deceased."

Said deeds were drawn from the possession of the defendant, and were introduced to show a common *propositus*. Plaintiff introduced CALVIN BROACH, who testified that his mother, Rachel Broach died in November, 1855 or 1856, he thought in 1855; and that his brother Robert, spoken of in his father's will, died before his brother John died; that his mother's sale of the premises in dispute, was not at public outcry at the Court House, but was a private sale. On cross-examination, he stated that soon after A. H. Broach bought the land, he went into possession, and Rachel Broach moved

away; and that A. H. Broach and defendant Leeves have been in possession ever since, and it has been open and notorious, and *known to the family*. (A. H. Broach is said Hamilton Broach.)

Here plaintiff closed his case. Defendant introduced no evidence. Defendant relied upon a plea of the statute of limitations.

Plaintiff's attorney requested the Court to charge the jury that the sale by Mrs. Broach, although made as executrix and under the order as read, permitting a private sale, was null and void, and did not pass the title out of George Broach's estate; that the statute of limitations did not commence to run against the plaintiff until the death of Mrs. Broach; and that the sale by Mrs. Broach, the life-tenant, did not forfeit her life-estate to the remainder-men, but was only a conveyance of her life-estate.

The Court declined to give either of said requests, but charged the jury as follows:

If you should believe from the evidence, that Hamilton Broach went into possession of the premises, under the deed of Rachel Broach as executrix, executed in 1852, and his successor, the defendant, went into possession immediately after his possession ceased, making the possession under that deed continuous, peaceable and uninterrupted for seven years immediately preceding the commencement of this suit, and that the plaintiff and those through whom he claims as legatees of George Broach, had *knowledge of said sale by said executrix, as set forth in said deed*; and that said Hamilton Broach and those holding under him, notoriously claimed said land as their own property, within the knowledge of plaintiff and those through whom he claims as legatee of George Broach, then the plaintiff's right of action is barred, and he cannot recover.

Verdict for defendant.

Plaintiff in error now assigns as error, the refusal to charge as requested and the charge as given.

JOHN RUTHERFORD, for plaintiff in error,

W. POE, for defendant in error.

WARNER, C. J.

This is an action of ejectment brought by the lessor of the plaintiff, to recover the one-fifth of a certain tract of land, devised by George Broach to his wife during life, with remainder to his children. John Broach, one of the testator's children, died, leaving a widow his sole heir, with whom the lessor of the plaintiff intermarried, and who now seeks to recover the possession of the one-fifth of the premises in dispute, as one of the remainder-men under the will of George Broach.

It appears from the record, that on the 3d day of April, 1852, Rachel Broach, as the executrix of George Broach, who had a life estate in the land under the will, sold the land at private sale, under an order from the Court of Ordinary for that purpose, to Alexander H. Broach, one of the remainder-men under the will, for the sum of two thousand dollars, conveying to the purchaser *the entire fee simple estate in the land*. Upon this statement of facts, the legal presumption is, that the remainder-men under the will, received from the executrix their *pro rata* share of the proceeds of the sale of the land in the due course of administration, and have not therefore, a very strong *equitable* claim now to recover their share of the land. Their legal rights, however, must be determined under the law as it existed in this State at the time the deed was made by Rachel Broach, conveying the entire estate in the land to Alexander H. Broach.

The defendant, who claims title and possession of the land under Alexander H. Broach as a purchaser of the entire interest therein, pleads the statute of limitations as a bar to the plaintiff's right to recover possession of the land from him. At what period of time did the statute of limitations commence to run against the remainder-men? Did the statute commence to run from the time Alexander H. Broach went into the possession of the land under his purchase from the executrix of George Broach, or did the statute commence to run only from the time of the death of Rachel Broach? This is *the question to be decided in this case.* .

By the common law of force in this State at the time the deed was made by Rachel Broach, the tenant-for-life, conveying the *entire estate* in the land, she *forfeited* her life estate therein, and the remainder-men had the right to *enter thereon*. See Statute 11th Henry VII; Schley's Dig., 146; 4th Comyn's Dig., top page 392; 2d Bl. Com., 274-5; 3d Bacon's Ab., top page 464, letter C.

Although the reason of the common law does not apply with the same force in this country as it did in England, in favor of the forfeiture of the life estate of the tenant, when he aliens the land by conveying a greater estate therein than by law he is entitled to do, thereby diverting the remainder or reversion from him who is entitled thereto, and renouncing his *fidelity* to his feudal lord; yet the *living principles* of the common law are applicable here. The testator in this case made the tenant-for-life his confidential friend, trusted to her *fidelity* to hold the land during her life for the remainder men, and her act, conveying a greater estate than she had in the land, was a *breach of trust*, an *open renunciation of her fidelity to him* under whom she held and derived her title.

Had this conveyance been made by the tenant-for-life to *all the remainder-men jointly*, instead of to one of them to the *exclusion of the others*, a different question might have been presented, in regard to which we express no opinion. The conveyance of the entire estate to one of the remainder-men to the *exclusion of the others*, was as much a breach of her fidelity to *those excluded*, as if the conveyance had been made to an entire stranger, and quite as prejudicial to their interest as such remainder-men.

The 2242 section of the Code is relied on, which declares that "No forfeiture shall result from a tenant-for-life selling the entire estate in lands: the purchaser acquires only his interest." The reply is, that the conveyance of the tenant-for-life in this case, was made *before* the adoption of the Code by the Legislature. The case of Parker vs. Chambliss, (12th Ga. Rep., 235,) is also relied on by the plaintiff in error. In that case, the only question involved and considered by the Court was, whether a *tenant-in-dower*, by committing *waste*,

forfeited her dower and treble damages by the Statute of Gloucester. This Court held that she did not, and that was *the only* question made, and *the only* question decided in that case.

But it is contended, (and there are to be found decisions in the books to that effect,) that although the remainder-men might have entered immediately upon the forfeiture of the life estate, yet they were not bound to do so until the death of the tenant-for-life, and therefore the statute of limitations did not commence to run against them until her death.

After *forfeiture* of her life estate by the sale of the land and the abandonment of the possession thereof to the purchaser, what interest had she in the land during her life, that would *prevent the entry* of the remainder-men thereon at any time, or *prevent* the running of the statute of limitations against their *right of entry* during her life? Upon *principle*, what has her life or death to do with the *right of entry* by the remainder-men after her life estate in the land is *forfeited*, and ceased to have any existence either in law or fact,—the more especially when they had *full knowledge of the forfeiture*. Why should not the remainder-men be required to prosecute their writ of formedon in remainder, or the modern substitute for it, the writ of ejectment, within the time required by the statute?

In view of the facts of this case when applied to our own statute of limitations, and the construction which has been given thereto both by the Courts and the Legislature, we think that the statute did commence to run against the remainder-men from the time *their right of entry on the land accrued to them*. The 2637th Section of the Code declares that, "Title by prescription is the right which a possessor acquires to property by reason of the continuance of his possession for a period of time fixed by the laws." The 2642d Section of the Code declares that, "Adverse possession of lands under *written evidence of title for seven years*, shall give a title by prescription."

In *Watkins vs. Woolfolk* (5th Ga. Rep., 261) this Court held that the statute of limitations in this State, not only

barred the right of action to recover the possession of land after the expiration of seven years, but barred *the right of entry also*. The record in this case shows that the defendant and Hamilton Broach, through whom the defendant claims title, were in the possession of the land for more than seven years, claiming it as their own, under written evidence of title derived from the tenant-for-life, by which she conveyed the *entire estate* in the land, which title was *adverse* to the title of the remainder-men, and *hostile* to their interest in the land. The record also discloses the fact that the remainder-men had *knowledge* of the conveyance of the entire estate in the land, by the tenant-for-life, and consequently had knowledge of *their legal right to enter upon the land at that time*.

The conclusion of the majority of the Court, therefore, is that the statute of limitations commenced to run against the plaintiff in error as one of the remainder-men, from the time of the sale by Rachel Broach of the entire interest in the land, in favor of the purchaser who went into possession under that sale, and those claiming under him by *color of paper title*, and that the deeds set out in the record, furnish sufficient evidence of color of title, to enable the defendant to protect his possession under the statute of limitations; and that there was no error in the Court below in refusing to charge the jury as requested, or in the charge as given. Therefore let the judgment of the Court below be affirmed.



WALKER, J., dissenting.

In this case I have the misfortune to differ with my associates. I have the satisfaction, however, of knowing that this difference of opinion can affect only cases growing out of transactions prior to the adoption of the Code. By Section 2242 it is provided that "no forfeiture shall result from a tenant-for-life selling the entire estate in lands; the purchaser acquires only his interest." I think this is but a legislative declaration of what was already the law.

The position maintained by the majority, as I understand it, is that the attempted sale by Mrs. Broach of the fee forfeited the life-estate to the remaindermen, and that the possession of Hamilton Broach, from the date of his purchase in 1852, was adverse to the title of the other remaindermen; in other words, that the sale not only forfeited the life-estate, but the remaindermen were bound to assert their rights accruing by reason of the forfeiture, or endanger their title in remainder.

1. It is true that at common law a life-tenant might, by *feoffment, fine, or common recovery*, forfeit his estate to him in remainder; because such alienation amounted to a renunciation of the feudal connection and dependence, and tended to divest the remainder expectant. Another reason given was that the life-tenant, by granting a larger estate than his own, put an end to his own original interest, and the next taker was entitled to enter regularly, as in his remainder or reversion. 2 Bl. Com., 274-5.

2. But in a note it is said that a conveyance by lease and re-lease, or bargain and sale, does not work a forfeiture. *Ib.*, Note (16). This note, as I think, is sustained by the common law authorities. Feoffments, fines, and common recoveries, operated "by way of transmutation of possession;" while a bargain and sale is a contract by which a person conveys his lands to another for a pecuniary consideration; in consequence of which an use arises to the bargainee, and the statute (of uses) immediately transfers the legal estate and possession to the bargainee, without any entry or other act on his part. 2

Thomas' Co. Litt., top p. 578 (Note B); citing 2 Ju. 671. A bargain and sale is a conveyance operating under the statute of uses, and never was liable to many of the incidents of feoffments, fines, and common recoveries. A bargain and sale does not, like a feoffment with livery, at common law, *ransack the whole estate* and extinguish every right and power connected with it. 4 Kent. Com., 84. "A mere grant or release by the tenant-for-life passed at common law only what he might lawfully grant." *Ib.*, 83. "And so note two diversities: first, between a grant by fine, (which is of record,) and a grant by deed in *pais*; and yet in this they both agree that the remainder or reversion in neither case is divested; secondly, between a matter of record, as a fine, &c., and a deed recorded, as a deed enrolled, for *that worketh no forfeiture.*" 2 Thomas Co. Litt., top p. 207. "So it is no forfeiture if tenant-for-life conveys by bargain and sale, or by lease and re-lease to another in fee." 2 Leonard's Rep., 60 (1598). ("Leonard's Reports," says Sir Edward Sugden, Treat. on Powers, 6 Ed., 16, "were always in high estimation;" and this opinion is confirmed by Lord Nottingham. "The Reports," 99.) 2 Thomas Co. Litt., top p. 115, Note (L. 3); 4 Com. Dig., 395; "Forfeitures," (A. 3); 3 Mod. Rep., 151. "At common law, where a tenant-for-life undertook to convey by feoffment a larger estate than he himself owned, such interference with another's title, operating to divest the remainder or reversion, was punished by forfeiture of the estate-for-life to the remainderman or reversioner. This principle, founded on the feudal system, according to which such a conveyance was a renunciation of the connection between the lord and his vassal, is for the most part obsolete in American law. It is said by one distinguished commentator that scarcely a direct decision upon the subject is to be found in our American books; and another is of opinion that as the form and nature of American conveyances is that of a grant, which passes nothing more than the grantor is entitled to, the doctrine of forfeiture is not in force, even independently of statutory provisions, in the United States." 1 Hill Real Prop., 103-4 (quoting 5 Dana, 5, 11; 4 Kent, 106); *ib.*,

528; 4 Com. Dig., 395, Note (g); 3 Bac. Abr., 465-6. "Estate for life, and occupancy." 1 Greenl. Cruise Dig., top p. 113, Note (1), (Tit. 3, Ch. 1, Sec. 36); ib., 777 (Tit. 16, Ch. 6, Sec. 8); 2 Vol. Greer. Cr. Dig., 157; (4 Vol., 112, Tit. 32, Ch. 10, Sec. 32-3;) 2 Bac. Ab., 4, "Bargain and sale." To my mind, these authorities establish the position that at common law a bargain and sale of the fee by tenant-for-life did not forfeit the life-estate; but the bargainee took such interest as the life-tenant had the right to sell.

I am aware that some cases seem to decide that a bargain and sale with a *general warranty of title* may produce a discontinuance, and perhaps a forfeiture. *Stevens vs. Winship*, 1 Pick. Rep., 327; *McKee vs. Plant*, 3 Dall., 486; 3 Thomas's Co. Litt., 93, Note (A); ib., 125. Without admitting the truth of this position, a sufficient reply is, that the deed from Mrs. Broach to Hamilton Broach does not contain a general warranty. It warrants the title "so far as her office of executrix will authorize her, against all claims whatsoever, and not to be liable *only in her representative character as executrix*." In the case of *Aven vs. Beckam*, 11 Ga. Rep., 1, where the doctrine of the liability of an administrator was carried so far that the Legislature in a year or two afterwards changed the rule there laid down, the Court says (p. 8): "If the administrator, in explicit terms, stipulates that he shall not be bound, the other party would be also bound by the stipulation; and the warranty, binding neither the estate nor the administrator, would be a mere nullity." Here is an express stipulation against personal, individual liability. No stress was laid upon this point in the argument—it was not insisted that the question of warranty had anything to do with the case. The whole of the brief of Colonel Poe, for defendant in error, on this point, was this: "The plaintiff is barred by the statute of limitations. The deed of Rachel Broach was made in 1852 to A. H. Broach, and he and defendant have had open and notorious possession ever since. The deed constitutes color of title, even though the vendor had only a life estate, and her authority to sell was only by virtue of the devise of a life estate. For as her deed con-

veyed a fee simple title, this act constituted a forfeiture of the life estate, and the remaindermen were entitled to enter *co-instantly*; and the statute commenced running at the date of the deed; to wit, in 1852. 2 Bl. Com., 274, 275; Co. Litt., 251; Litt., Sec. 415."

3. Suppose I am wrong in this, and that a bargain and sale of the fee did at common law forfeit the life-estate, still I insist, that such was not the law in Georgia. By our adopting act, (Cobb's N. D., 721,) we adopted such of the common law of England and such of the statute laws as were usually in force in the province on the 14th day of May, 1776, and were properly adapted to the circumstances of the inhabitants. The reason of the old law of forfeiture for alienation never existed in this country, the law was not adapted to the circumstances of our people. Feoffment with living at common law, and fine and common recovery; so far as I know, were never used in this State as modes of conveyance. The modes of conveyance most in use, and of which our statutes speak, are bargain and sale and lease and release; and I am not aware that an alienation of the fee, by a life-tenant, by either of these modes of conveyance, has ever been held to be a forfeiture in Georgia, until the present time. I think the authorities already cited sufficient to show that the whole doctrine of forfeiture by alienation of a greater estate than the grantor possesses, is inapplicable to the condition of our people, and is not a part of our law.

4. Suppose, however, that I am wrong in this position also, and that a bargain and sale of the fee may work, in this State, a forfeiture of the life-estate; will the possession of the purchaser from the life-tenant be adverse to the title of the remainderman? I think not. My position is, that if there be a forfeiture of the life-estate, to the remainderman, by alienation, that he in remainder then has two titles, and may enforce either at his option. He may at once proceed and recover on his title by forfeiture; or, he may waive that title, and on the death of the tenant-for-life, assert his title in remainder. The possession of the purchaser may be adverse, as against the title by forfeiture, without affecting in

any way the title in remainder. The two titles are in the same person, it is true, but the rights may be affected and enforced in the same way as if they were in separate persons. The old maxim applies, "*Quando duo jura concurrunt in una persona, aequum est ac si essent in diversis.*" (Where two rights concur in one person, it is the same as if they were in separate persons.) Branch's Maxims, 120: "Where there exists two separate rights of entry, the loss of one by lapse of time will not impair the other." Ang. on Lim., sec. 375. Hunt vs. Burn, 2 Sack., 421. In Goodright vs. Forrester, 8 East's Rep., 551, it was decided that "The fine of a tenant-for-life divests the estate of the remainderman or reversioner, leaving him only a right of entry, to be exercised either then, by reason of forfeiture, or within five years after the *natural determination* of the preceding estate." Lord Hardwicke says, "That a remainderman, expectant on an estate-for-life or years, to whom a right to enter, or bring ejectment, is given by the forfeiture of the tenant-for-life or years, is not bound to do so; therefore, if he comes within his time, after the remainder attached, it will be good; nor can the statute of limitations be insisted on against him for not coming within twenty years after his first title accrued by the forfeiture." Kemp vs. Westbrook, 1 Vesey, sen. 278, (decided in 1749). "If, however, there be in any State a forfeiture of the life-estate by the act of the tenant-for-life, the party entitled to enter by reason of the forfeiture, is not bound to enter, and may wait until the natural termination of the life-estate." 4 Kent's Com., 84; 2 Greenl. Cruise' Dig., 249, (3 vol. 449, tit. 33, ch. 2, sec. 36); 1 Hill on Real Prop., 555-6; Doe ex dem. Allen vs. Blakeway, 5 Car. & P., 563; (24 E. C. L. R., 769); 1 Wms. Saun. Rep., 319b; Ang. on Lim., 375. These authorities establish the position that the remainderman may assert his title in remainder, and the possession of the purchaser from the life-tenant will not be adverse until the death of the life-tenant, although the life-estate may have been forfeited by the alienation. Such possession is not hostile to, but is consistent with, the title in remainder.

If, as I have endeavored to show, a bargain and sale of

the fee, by a life-tenant, did not, at common law, work a forfeiture of the life-estate; or, if such was the effect at common law, that this doctrine, not being adapted to our circumstances, never was incorporated into our laws; or, if, in case of a forfeiture to the remainderman, of the life-estate, by the life-tenant, the remainderman had two titles and could assert either at his option, and within the time allowed by the statute of limitations, from the accrual of his right of entry, by virtue of which ever title he may attempt to enforce, then the charge of the Court below was wrong, and the plaintiff should have a new trial.

The record shows that plaintiff's counsel requested the Court to charge, that the sale by Mrs. Broach did not forfeit her life-estate; and defendant's counsel requested him to charge that it did. Forfeiture or non-forfeiture was the issue; for, without a forfeiture, there could be no sort of ground for insisting that the possession of the purchaser from the life-tenant was hostile to the title of the remainderman.

The other question made by this record, viz.: whether the title passed by virtue of the sale, made by order of the Ordinary, authorizing a private sale, was not considered by the Court; and therefore it would be improper for me to express an opinion upon this point. To my mind, this was the real question in this case, but a decision upon it was rendered unnecessary by the views entertained by the majority upon the question of the statute of limitations. For the reasons given, I dissent from the judgment rendered in this case.

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The Mayor, &c., of Savannah vs. Burroughs.

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THE MAYOR AND ALDERMEN OF THE CITY OF SAVANNAH,  
plaintiff in error, vs. ELIZA G. BURROUGHS, defendant in  
error.

By the Act of 7th March, 1866, copies of lost bonds, or notes, may be established without requiring indemnity, unless the party liable for the payment of such lost paper shall make oath, as required by the second section of said Act, which being done, the party seeking to establish the copy bond, or note, shall be remitted to the remedies provided by law, before the passage of the Act of 1866.

Motion to establish lost bonds. Decided by Judge FLEMING, at Chambers, during Chatham Superior Court, May Term, 1866.

Said cause was a petition to said Court, by said Eliza G. Burroughs, for the establishment, against the said The Mayor and Aldermen of the City of Savannah (a municipal corporation), of two coupon bonds issued by said corporation, each for the sum of five hundred dollars, one numbered seven hundred and seventy-one (771), and the other seven hundred and seventy-two (772), signed R. Wayne, Mayor, and Joseph W. Roberts, City Treasurer, dated on the first day of December, eighteen hundred and fifty-three, with fifty coupons attached to each, for seventeen dollars and fifty cents for the semi-annual interest secured by each coupon; the bonds themselves being payable to the bearer thereof, on the first day of December, in the year eighteen hundred and eighty-eight, and the coupons also payable to the bearer, on the first day of June and the first day of December of each year; and which bonds, with said coupons attached, were, in said petition, averred to have been burned at Columbia, South Carolina, on the night of the seventeenth of February, eighteen hundred and sixty-five, at the burning of that place by the army of General Sherman. Said petition was verified by the affidavit of the applicant.

To this petition, said corporation, by its attorney, filed a plea or answer, to the effect that there was not sufficient evidence, under the proofs in said cause, that said bonds, with coupons attached, were either lost or destroyed; and, again,

that if there were such proofs in said cause as would authorize the establishment of said alleged bonds as either lost or destroyed; yet that the establishment of such bonds, if granted by the Court, should be upon such just and equitable terms as would secure said corporation from the possibility of loss in case such bonds should thereafter prove to be in existence.

Petitioner's attorneys then introduced in evidence the testimony of WILLIAM F. DESAUSURE and EDWIN J. SCOTT, of Columbia, South Carolina, taken by commission. Mr. DeSausure testified that petitioner was his daughter, and resided with him at Columbia; that he had in his possession the bonds in question, which were the property of petitioner, on the sixteenth day of February, eighteen hundred and sixty-five, and that they had been so in his possession for many years previous, for safe keeping, and that he might get the coupons cashed for her as they became due; that they were kept with his own stocks in a locked drawer in his office about one hundred and fifty yards from his dwelling; that on the fifteenth of said February, General Sherman's army approached Columbia, and that on the sixteenth of said month, witness, with some ladies of his family, left Columbia for Camden, and that he therefore knew nothing personally of what occurred in Columbia after he left, but that, upon his return soon after the enemy left, he found his dwelling and office burnt, with all his books and papers; that not a house was left standing within several hundred yards of his office, and it was morally certain that the bonds in question perished in the conflagration, although he did not see them burnt; that there were nine law offices adjoining each other, of which his was one; that all were burned to the ground, but witness never heard it alleged that any of them were broken open and plundered; that, on the fifteenth of February, to guard against contingencies, he made a descriptive list of stocks, deeds, bonds, &c., which he held in his own right, or as trustee, guardian, or agent, and among these were petitioner's bonds—the bonds and other valuable papers  
he been returned to the drawer, and the list kept in his  
that on the twentieth of April he advertised for a



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renewal of certificates of stocks, etc., which had been destroyed, and that most, but not all, of the certificates had been renewed by the respective companies; that all the coupons, not due, were attached to the bonds; and he believed the coupons due in December, 1864, were unpaid and still attached to the bonds, but this he could not say with absolute certainty.

On the cross-examination, this witness stated that he could not say the bonds were destroyed by fire or otherwise; that he had stated the facts he knew, and others must draw the conclusion; that the bonds were in his possession on the 16th of February, looked up in his office; on the 17th the city was destroyed, and his office burnt with all his papers; that he has never heard of the bonds since, and that he had no reason to suppose they were abstracted from his office before the fire; and that he thought, but was not certain, that the coupons due in December, 1864, were still attached and unpaid.

The other witness testified that he had no knowledge of the bonds in question; that, as cashier of the Commercial Bank of Columbia, he had collected for Mr. DeSaussure, several times within the last ten years, two coupons of the city corporation of Savannah, for seventeen dollars and a half each, which Mr. DeSaussure said belonged to his daughter, Mrs. Burroughs.

Upon the foregoing state of the pleadings and evidence, the cause was submitted to the Court, after argument by the attorneys of the petitioner, and argument by the attorney of said corporation of Savannah—the attorney for said city insisting that there was no legal certainty, under the proofs in said cause, that said bonds of petitioner, with coupons attached, had been destroyed; and therefore, it was the duty of the Court, before establishing the same, to require of the petitioner indemnity to said corporation. The Court made the rule absolute for establishing said coupon bonds, without indemnity to said corporation, and put its decision on the alleged validity of the Act of the seventh day of March, eighteen hundred and sixty-six, entitled "*An Act amendatory*

of the law relating to the establishment of "lost papers," and ruled that it was not necessary to decide whether, under the law as it existed before that statute, the defendant would be entitled to a bond of indemnity; and that the law, as it existed before that statute, had nothing to do with the case until the defendant should have taken the oath prescribed in that statute.

Whereupon, counsel for said corporation moved the Court for a re-hearing of said cause, on several grounds, and, amongst others, that said Act of 7th March, 1866, according to the construction put upon it by the Court, would be unconstitutional, as violative of private right in denying the right of cross-examining witnesses, and the right of trial by jury, and subjecting parties to the risk of paying debts twice; and that, if strictly construed without reference to previous legislation and law upon the same subject, said Act would take from courts the power to require indemnity from applicants for establishing lost papers; and the Judge of said Court refused a re-hearing, thereby affirming the previous decision of the Court in the premises.

To which rulings and decisions of said Court and Judge, in the premises, the said corporation by its said attorney excepted, and now says:

1. That the Court erred in deciding that there was before it sufficient legal proof of the destruction of said coupon bonds of petitioner sought to be established.

2. That the Court erred in refusing to require said petitioner, Eliza G. Burroughs, to give indemnity to said corporation upon the establishment of said bonds as destroyed or lost.

3. That the Court erred in deciding that said Act of 7th March, 1866, did or could constitutionally authorize the Court to establish said coupon bonds, without indemnity, and that it did or could constitutionally deny the right to cross-examine or take away the right of trial by jury; that it should make oath that said bonds never same had been paid off or discharged; and that it erred in deciding that there was any

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law repealing or interfering with that part of the sixth section of the Act of the sixteenth day of February, in the year seventeen hundred and ninety-nine, entitled "*An Act to amend an Act entitled 'An Act to revise and amend the judiciary system of this State,'*" which declares that "the said Courts respectively shall have power and authority to establish copies of lost papers; deeds or other writings, under such rules and precautions as are or may have been customary and according to law and equity."

5. That said Court erred in not granting the motion for a re-hearing of said cause.

EDWARD J. HARDEN, for plaintiff in error.

LAW & LOVELL, for defendant in error.

WARNER, C. J.

That the Superior Courts in this State have the power and authority to require indemnity where lost papers are sought to be established, under such rules and precautions as are or may have been customary, and according to law and equity, cannot be doubted; but the question to be decided in this case is, what does the law require? Does the existing law require, or is it "according to law" that indemnity shall be given by the party seeking to establish a copy of a lost bond or note, before he is entitled to the judgment of the Court in his favor? The Act of 7th March, 1806, furnishes the conclusive answer to this inquiry: that Act, not violating the Constitution, is, in our judgment, the law applicable to this question, and must control it.

This Act was passed in view of the then condition of the country, and was intended to give to parties whose papers had been lost or destroyed a summary remedy to establish copies thereof, to "be used in any Court of this State in lieu of the lost original." There is, however, by the second section of the Act, a precautionary rule adopted for the protection of the makers of the original papers alleged to have been lost or destroyed. The second section of the Act de-

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clares, "That if any party who is liable for the payment of said lost paper in whole or in part, or whose interests are affected by the establishment of said paper, shall make oath that the said paper never existed, or that the same has been paid off or discharged, the party seeking to establish the same in the summary manner herein provided, shall be remitted to the remedies *heretofore provided by law.*" The evidence exhibited by the record in this case is very strong, that the original bonds were *destroyed*. There being no oath made in this case as allowed by the second section of the Act, and the petitioner having complied with the requirements of the first section, she was entitled to have the copy bonds established in accordance with the terms and provisions thereof. Let the judgment of the Court below be affirmed.

HARRIS, J., dissenting:

I regret that I cannot concur with my associates in the judgment rendered in this case. When it was argued last December, the then Court differed very essentially in reference to the several acts of the Legislature, passed since the Judiciary Act of 1799, touching the establishment of lost papers.

By the sixth section of the Act of 1799, it was enacted "that the said Courts respectively shall have power and authority to establish copies of lost papers, deeds or other writings, under such rules and precautions as are or may have been customary and according to law and equity." I entertained then and now the opinion that the power thus conferred contained within it necessarily the power to require indemnity to be given by a party seeking to establish a copy of a lost security for the payment of money—that this power to require indemnity was unaffected by the Act of 1866, or by any and all of the acts passed since 1799—that these acts were made only to facilitate and provide for a summary or

speedy establishment of copies. My then associates did not assent to my view of these acts, but deemed the Act of 1866 as peremptory, and that it excluded the Judge from the exercise of the power to require indemnity as preliminary to or concurrently with the establishment of copies under that Act.

At the June term, 1867, the case not having been decided, (Judge Warner having succeeded Judge Lumpkin,) was brought up for final consideration. The Court were then unanimous in the distinct recognition of the general power of the Superior Courts to require indemnity, and that that power was unaffected by the Act of 1866.

I entertain the view, that in the establishment of money securities, indemnity should be required at the time when copies are sought to be established, otherwise it will fail to protect obligors, and will prove illusory—thus, suppose the established copy bonds and coupons get into the hands of *bona fide purchasers without notice*, how can such holders when calling for payment be required to enter into any indemnifying bond without the violation of all principle? Thus the obligors, if the original bonds and coupons are in existence, (as I think probable, for the evidence does not convince me that they were burned,) will be bound to pay them to *bona fide* holders. Of these last, no indemnity can be exacted. The result will be, from a failure to require indemnity when the copy bonds and coupons were established, the obligors are exposed to a double payment, and have no protection against such palpable injustice.

I therefore dissent from the judgment rendered.

THE MAYOR AND ALDERMEN of the City of Savannah, plaintiffs in error, vs. VIRGINIA J. COHEN, administratrix of ISAAC S. COHEN, deceased, defendant in error.

By act of 7th March, 1866, copies of lost bonds or notes may be established without requiring indemnity; unless the party liable for the payment of such lost paper shall make oath as required by the second section of said act, which being done, the party seeking to establish the copy bond or note shall be remitted to the remedies provided by law before the passage of the act of 1866.

Motion to establish lost bonds. Decided by Judge FLEMING, Chambers, during May Term, 1866, of Chatham Superior Court.

This was a proceeding by defendant in error before said Judge to establish certain lost bonds, (to wit: sixteen bonds for five hundred dollars each, numbered, and due as follows: Nos. 633 and 634, payable in 1888, with interest at seven per cent. *per annum*, payable in June and December in each year; Nos. 36 and 38, payable in 1874, with interest as aforesaid, payable in May and November in each year; bonds Nos. 109 and 110, payable in 1877, with interest as aforesaid, payable in February and August each year; Nos. 376, 377, 378, 379, payable in 1878, with interest as aforesaid, payable in February and August each year; No. 8, payable in 1872, with interest as aforesaid, payable in July and January in each year; Nos. 3, 4, 5, 6, 7, payable in July, 1872, with interest as aforesaid, payable in January and July each year, (said last five having been issued 7th July, 1862; all of said bonds and coupons thereto attached being payable to bearer,) by affidavit averring that on the 4th March, 1865, the said bonds were burnt in Cheraw, South Carolina, by soldiers of the United States army; that none of the coupons had been detached therefrom or paid since 1st January, 1864; and that the same were destroyed with said bonds; that her said husband, Isaac S. Cohen, is dead; that she is his duly qualified administratrix, and as such claims said bonds and coupons.

Notice was served according to the statute, 7th March,

1866, that application would be made to the Judge of said Court, during said term, to establish the original bonds and coupons so alleged to have been destroyed; and on the foregoing facts, and without further evidence or proof, said application came on to be heard before said Court on the third day of July, 1866.

Said corporation appeared by its attorney, who, before filing any written defence, objected and insisted that there was no authority in the Court for trying said cause at that term, on application filed and notice given during the term, and that there was no precedent or authority for establishing negotiable papers, transferable from hand to hand, alleged to be lost or destroyed, until such time as such papers should be due, and the risk of their transfer to a holder in good faith passed. Said attorney further argued and insisted that the act of the seventh day of March, eighteen hundred and sixty-six, entitled "An Act amendatory of the Law relating to the establishment of Lost Papers," was violative of common right and unconstitutional, if its effect was either to deny to said corporation the right to cross-examine the witness on whose affidavit the papers were sought to be established, or to take away the right of trial by jury, or to disable the Court to require indemnity from the applicant, or to subject said corporation to the risk of having to pay said bonds and coupons twice. Subject to said objections and points, and not waiving them, said attorney then filed a plea or answer, to the effect that there was not sufficient evidence that said bonds with coupons attached were either lost or destroyed; and that if there was such proof in the case as would authorize the establishment of said alleged bonds as either lost or destroyed, yet that their establishment, if granted by the Court, should be upon such just and equitable terms, as to indemnity, as would secure said corporation from the possibility of loss in case such bonds should afterwards prove to be in existence.

After argument had in support of and against the foregoing grounds of defence, the Court ordered said bonds, with coupons attached, to be established in lieu of the originals,

without indemnity to said corporation, and putting said decision on the alleged validity of said act of seventh March, eighteen hundred and sixty-six; overruling all the points made on behalf of said corporation, and ruling that it was not necessary to decide whether, under the law as it existed before that statute, the defendant would be entitled to a bond of indemnity; and that the law as it existed before that statute had nothing to do with the case until the defendant should have taken the oath prescribed in that statute.

To which decision and rulings of said Court and Judge in the premises, the Mayor and Aldermen of the City of Savannah, by their attorney, excepted and say that said Judge erred—

1st. In deciding that such application could be heard without having been made returnable to a term.

2d. In deciding that the Court has authority to establish lost negotiable papers, transferable from hand to hand, until such time as said papers should be due.

3d. In deciding that there was before the Court sufficient legal proof of the destruction of said bonds sought to be established.

4th. In refusing to require said applicant, Virginia J. Cohen, administratrix as afore-said, to give indemnity to said corporation upon the establishment of said bonds as lost or destroyed.

5th. In deciding that said act of 7th March, 1866, did or could constitutionally authorize the Court to establish said bonds without the right on the part of said corporation to cross examine the said applicant, and to establish said bonds without indemnity; and that said act did or could constitutionally take away the right of trial by jury, unless the defendant should make oath that said bonds never existed, or that the same had been paid off or discharged.

6th. In deciding that there was any law repealing or interfering with that part of the sixth section of the act of the sixteenth day of February, in the year seventeen hundred and ninety-nine, entitled "An Act to amend an Act entitled 'An Act to revise and amend the Judiciary System of this



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State," which declares that "the said Courts, respectively, shall have power and authority to establish copies of lost papers, deeds, or other writings, under such rules and precautions as are or may have been customary and according to law and equity."

EDWARD J. HARDEN, for plaintiffs in error.

LAW and LOVELL, for defendant in error.

WARNER, C. J.

The same question being involved in this case as in that of the Mayor and Aldermen of the City of Savannah vs. Burroughs, both cases were argued together, and the decision in that case must control and decide this case.

Let the judgment of the Court below be affirmed.

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\*GEORGE WASHINGTON, (Negro) plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

1. Where a defendant is indicted and put upon his trial for the crime of murder, it is the duty of the Court to give in charge to the jury the law defining that offense; and if the evidence shall authorize it, but not otherwise, also to give in charge to the jury, the law defining the inferior grades of homicide less than murder, as declared by the Code of this State.
2. When a defendant is indicted as the actor or *absolute* perpetrator of the crime of murder under the Code, it is error in the Court to charge the jury, that they can find him guilty as principal in the second degree; but on the trial of a defendant so indicted, if the evidence shall authorize it, the Court may charge the jury, that if they believe from the evidence that it was the intention of the parties engaged in a common difficulty, to do an *unlawful* act, and the defendant in the prosecution of that intention, committed the homicide upon the deceased; or if they should believe from the evidence, that the homicide was committed upon the deceased by either of the parties engaged in the prosecution of that common intention, when they might find him guilty.
3. When a verdict is found against a defendant, of "guilty of murder as

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principal in the second degree," when he is indicted as the absolute actor and perpetrator of the crime, the verdict does not speak the truth as to the issue formed upon the indictment, and is error.

Murder. Motion for New Trial. Tried before and decided by Judge VASON. Bougherty Superior Court. May (Special) Term, 1867.

The bill of indictment, in proper form, charged the defendant, alone and as the actual perpetrator, with the murder of Henry Holmes, with a knife, on the 13th April, 1867.

The evidence produced at the trial, *pro and con.*, was as follows:

## EVIDENCE FOR THE STATE.

EDMUND WOOLDRIDGE, (colored) swore: On Saturday night, when witness came from work at the brick-yard, he came by Henderson's house; this was about three weeks ago, and about supper time. At that time Henderson and Proctor came out of Roxy Hatcher's House, and Henderson said it was all right; but Proctor said it was not all right with him, and then Proctor struck him. Henry Holmes (deceased) was right ahead of them, and hallooed "Help! Help!" and prisoner ran up to deceased and struck at him, and kicked at him, and said to deceased, "What have you got to do with it, God damn you!" Witness went to deceased immediately as he was hallooing, and found him badly out in his bowels, of which wound he afterwards died; and deceased stated to witness, that it was that Baltimore negro that cut him. Prisoner, Proctor, Henderson and witness were the only persons present at that time. Witness did not see the knife in prisoner's hand—supposed at the time that he had struck him only.

## CROSS-EXAMINATION.

It was a moonlight night. There was no person present when prisoner struck deceased, but witness, Proctor, Henderson and prisoner. Prisoner had on a long-tailed dark overcoat and white hat; thinks the coat and hat he now has on

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are the same. Witness is certain the hat was white. There were no women present. John Brewer and Robert Rideout were not there. The house of Roxy Hatcher was on the north side of the street, and witness was on the south side of the street with the whole middle of the street between him and the parties fighting; he saw Roxy Hatcher in the door holding a candle. Does not know where prisoner came from, but saw him immediately after the fight; first saw him right where the parties were fighting; with his right elbow resting on the fence. Witness had seen prisoner several times before that, but had no acquaintance with him; he knew that was George Washington, the prisoner, that night,—knew him by his coat and hat. Witness was right by the parties when they were fighting; deceased was passing home on the same side of the street with the parties fighting, and deceased was about ten feet from the parties fighting. Deceased cried "Help! Help!!"

The street is not as wide as this court-room; it is about ten or fifteen feet wide. Witness was not under the influence of liquor, had not drunk a drop. Witness is certain it was prisoner that he saw; knew him by his coat and hat; don't know that he would have known prisoner but for his coat and hat.

#### REBUTTAL.

Prisoner had on a big, long, black overcoat and white hat. Prisoner and Proctor ran off after the fight. Prisoner knocked deceased down, and old man Ramo was knocked down immediately; then prisoner and Proctor ran off. Prisoner was arrested next day, and witness saw him, and swears positively that he is the man that struck deceased.

DR. WILLIAM L. DAVIS, sworn, said: he attended deceased between 8 and 9 o'clock, P. M., Saturday night of the speaking, the 13th April last, and found deceased in a collapsed condition; his bowels were out with some sharp instrument; the intestines were out; one of them was cut about three inches. This wound produced his death; he lived about four or five days.

GEORGIA ANN HENDERSON, sworn, said: she then lived across the street from where the fight took place; she is the wife of Henderson; he had gone across the street to Roxy Hatcher's to pay her some money. From witness to where the fight took place, it was sixty feet. When she heard the hallooing, she went out and met prisoner, Proctor and Rideout; they came to her house and got their things. Prisoner had on a dove-colored coat, and a hat such as he has on now. Robert Rideout had on a long dark overcoat and black hat. Proctor had on a blue knit coat and a velvet cap. This was the same night deceased was wounded.

## CROSS-EXAMINATION.

Witness met these three, right at the place where the fuss was; she soon after saw the others of the Baltimore crowd; saw nothing of the fight herself. The Baltimore crowd, including prisoner, boarded at witness's house at the time of the fight. She thinks prisoner had on a white hat, and knows he had it on in the afternoon before. About one hour before the difficulty, prisoner had on a short, dove-colored coat and white hat; and when she met him going away from the difficulty, he had on the same dress. Witness does not know whether it was a dark or moonlight night.

IDA HOLLY, sworn, said: she is the daughter of old man Romeo; lives near the place of the fight; went out with her father to stop the fight. Proctor had Henderson down, beating him; her father called to them to stop their fighting. Prisoner said, "God damn you, what business is it of yours?" and knocked her father down. Proctor, Henderson, prisoner, her father and herself were the only persons she saw. Prisoner had on a long, dark overcoat and a white hat, such as he has on now.

JAMES KEMP, Sheriff, sworn, said: he arrested prisoner next morning early, together with four other negroes, called the Baltimore crowd of negroes, found at John Flint's place, where they were employed, and brought them to Albany. The witness, Ed. Wooldridge, selected prisoner from the crowd, as being the man who cut deceased.

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## EVIDENCE FOR PRISONER.

JOHN W. PROCTOR, sworn, said: he was fighting with Henderson, had knocked him down several times, and prisoner said, "West, that will do, don't do it." The fighting then ceased. There were present at the time of the fighting, prisoner, witness, Henderson, John Brewer and Robert Rideout. As they passed across the street towards Henderson's house, they met Henderson's wife about half way, and when witness reached Henderson's house, Rideout came up to him and said he had cut a man. Witness advised him to go out to Mr. Flint's farm. He saw the knife with blood upon it, next morning at Mr. Flint's house, which Rideout said was the one he cut the man with. Prisoner had on that night, at the time of the fight, a dove-colored sack-coat and the same hat he has on now. Rideout had on the coat which prisoner has on now. Prisoner has on the same sack-coat now that he had on that night, and the overcoat that he has on now, is the one Rideout had on, the night of the difficulty. Prisoner remained near witness during the whole of the fight, and went with him on to the house of Henderson. Witness did not see deceased before the cutting. Witness did not see prisoner do any cutting, and was not far enough for prisoner to do any cutting without witness seeing it. It was ten or fifteen paces from where witness was fighting, to where deceased fell. Witness saw nothing of deceased at the time of the fighting; heard no noise or complaint made by deceased while the fighting was going on.

## CROSS-EXAMINED.

Witness was living at Henderson's house at the time of this difficulty, and had been boarding at Henderson's house for three or four days. Witness did not hear deceased hallooing. Prisoner could not have cut deceased without witness seeing it. Witness was in his shirt sleeves, had on a hickory shirt. Prisoner was standing all the time by witness. Deceased was lying ten or fifteen paces west of where the fight

was going on. Witness did not see the deceased, nor hear anything of him until after the fight. Romeo did not come up and command the peace; prisoner did not knock Romeo down. Ida, Romeo's daughter, was not there at the time of the fight; there was no woman there at the time of the fight. A good many persons came up afterwards, as witness was leaving.

JOHN BREWER, sworn, said: he was present and saw the fight between Proctor and Henderson; was close to the parties fighting. Deceased came up during the fight and said, "Help! don't beat that man any more." Then witness saw Rideout draw back his hand like he was going to strike deceased; and in a few seconds he heard deceased say he was cut. Rideout had a knife in his hand; witness did not see Rideout cut him. They all then went to Henderson's house. Witness heard Rideout say as they were going to Henderson's house, "Boys, I've cut a man, and what must I do?" They answered him, to go out to the farm. Witness saw the knife that Rideout said he cut the deceased with, and it had blood on it. Prisoner had on a short sack-coat, light-colored. Rideout had on black pants, black, big overcoat, and black hat. Prisoner was ten or twelve steps from deceased when he cried out "Help!" Prisoner was not nearer than five or six steps to deceased at any time.

Prisoner knocked down one old man; don't know who he was; an old man was knocked down close by where the fighting took place.

## CROSS-EXAMINED.

Witness was about ten feet from the fight; Proctor did not get Henderson down; prisoner knocked that old man down; the old man did not come nearer than ten feet.

Prisoner had on the same pants he now has on, and a little light-colored coat. After Rideout raised his hand, as soon after as it would take to speak a word or two, witness heard deceased say he was cut; deceased was ten or twelve steps from where the fighting was going on when he said he was

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cut; deceased and Rideout were close enough for Rideout to have cut him.

ROBERT H. RIDEOUT sworn, said: he was present at the fight above mentioned; knows prisoner did not cut deceased; prisoner had on a sack dove-colored coat; witness had on a long black over-coat.

CROSS-EXAMINED.

Witness was about the factory on the river when he first heard the fuss, and then ran, in a pretty quick run, to where the fighting was; prisoner, Stephen Brown, Charles Randolph, and John Brewer were with witness when they heard the fuss, and we all got there about the same time; witness was about ten or twelve feet from the parties while fighting; he saw one man fall that was knocked that night, but he does not know who it was.

The old man that was cut was west of where the fighting was going on; one old man came up there and tried to make peace; witness pulled Proctor away from Henderson; deceased was cut during the time of the fight; witness had on prisoner's coat that night, the one prisoner has on now; prisoner had on the white hat he now has.

The fight lasted twenty or thirty minutes after witness got there; witness saw Henderson fall twice after witness got there; witness had the coat on at the time of the fight.

EVIDENCE OF THE STATE IN REBUTTAL.

ROMEO BRISBANE sworn, said: he was not present at the commencement of a difficulty between Proctor and Henderson; he came up while they were fighting, and said, "Boys, you must not do that way," and prisoner then knocked witness down; prisoner had on just such a coat as he now has on; witness saw no one except Proctor, Henderson, and George Washington (prisoner), just behind Proctor.

Nobody else was present, but others were off a little way; witness did not see deceased at that time.

## CROSS-EXAMINED.

Prisoner was as near as three steps; prisoner had on a long dark-colored coat, but witness could not tell the color.

## REBUTTAL.

Witness saw prisoner in the face that night, and knows it was he; knows he was the man that knocked him (witness) down; witness met Edmund Wooldridge going from the fight as witness went up; it is about forty feet from witness' house to where the fight was.

ARCHER HENDERSON sworn, said: the fight was the same day of the speaking or meeting; prisoner was at witness' house about supper time, and had on the same coat he now has on; witness did not see prisoner at the time Proctor struck him; prisoner was at his house fifteen minutes before the fight.

## CROSS-EXAMINED.

Witness left the crowd of Baltimore boys at his house; they fought about four minutes.

## RE-EXAMINED.

Proctor hit witness three times to his recollection, and kicked him.

NELSON TIFT sworn, said: From his knowledge of the character of Edmund Wooldridge and Romeo Brisbane, they ought to be believed by a jury; from his knowledge of these two boys, he would believe them as quick as any colored boys he ever saw.

PATSEY SLAUGHTER sworn, said: She heard deceased halloo that he was a dead man, and ran up to him. She saw prisoner, and a yellow man that was with him, pass by her about ten feet off, going to Henderson's house. Prisoner, she thinks, is the man.

VINEY FERGUSON sworn, said: She was with deceased up to the time of his death. Deceased asked if Mas'r Asa Tift



had come. Mr. Asa Tift soon appeared, and deceased remarked to him, in his last words, that "George Washington (meaning the prisoner), killed him for just two words, killed him for nothing."

Here the evidence closed, and after argument had, the Court charged the jury as follows :

1st. You ought to give such construction to the statements of all the witnesses in this case as shall reconcile them and prevent a conflict, if possible. Each one is to be supposed to have spoken truly, but if you cannot avoid a conflict, then you must determine the truth.

2d. Those witnesses who show that they have the best means to be well informed on the matters about which they have testified, (all other things being equal,) are to be preferred to those who have not such good means for accurate information.

3d. If, after a review of all the evidence in this case, you have resting on your minds a reasonable doubt as to the guilt of the defendant, he is entitled to the benefit of such doubt, and you ought in that event to acquit him.

4th. The State's counsel is not bound by the statements or evidence of one of the witnesses introduced for the prosecution ; such witness' statements may be attacked by the State if they are not sustained by the evidence of other witnesses ; the State is not bound to adopt the evidence of such witness.

5th. As the counsel both for the prosecution and State have here conceded that the perpetrator of this act is guilty of murder, I shall not charge you on the law relative to the different grades of homicide. If you are satisfied that the fatal stab was inflicted on the deceased, without any considerable provocation on his part, the law implies malice, and it is murder.

6th. The defence relied upon in this case, is that the defendant is not the perpetrator of the act, and you must be satisfied beyond a reasonable doubt that he was the perpetrator, or you cannot find him guilty of murder.

7th. The Solicitor General contends that, if he is not the actual perpetrator, yet he is chargeable for the act as princi-

pal in the second degree, under the facts of this case. Upon that subject I charge you; that, if defendant and others at the time of the killing were voluntarily engaged, with a common purpose and intent to fight and whip the man Henderson, then all who took part in it directly, or aided and abetted in it by keeping off (by threats, or blows, or otherwise), persons who desired to stop the fight and restore peace, are guilty of a riot; and if this homicide was committed upon the deceased by any one of the parties thus engaged, because he interfered to stop the fight, then each one thus engaged is responsible; and if the killing was without provocation, then each one is guilty—the man who struck the fatal blow is guilty as principal, and all the others thus engaged in the riot are guilty as principals in the second degree; and if you are satisfied from the proof that the defendant was thus engaged (beyond a reasonable doubt), then, though he may not be the party who used the knife, yet he is guilty as principal in the second degree, and you ought so to find him.

8th. Counsel for the prisoner desire that I charge you that the defendant cannot be found guilty, unless the proof shows that he had the intent to commit this crime. This I cannot charge you on this branch of the case; for if the defendant was engaged in a riot at the time of the killing, he as well as all others engaged with him, are liable for all acts committed by any one of the parties thereto; and it matters not whether defendant intended to commit this act or not, he is responsible if he was thus engaged, and the killing occurred during the riot, and was the act of one of the parties thereto."

Some time after the jury had retired to deliberate on their verdict, "the Court being satisfied that the jury did not agree as to what was the charge of the Court, at their request, recalled them and read the written charge" aforesaid, but refused to read them Section 3793 of the new Code, as to *impeaching* one's own witness, though requested by defendant's attorney to do so.

The jury again retired and returned the following verdict: "We, the jury, find the prisoner guilty as principal, of murder in the second degree. I. M. CUTLIFF, Foreman."

During the term, defendant's attorney moved for a new trial upon the grounds that the Court erred—

1st, In charging the 4th item of said charge.

2d, In charging upon the proposition of the Solicitor General, as appears in the 7th item of said charge.

3d, "In making the above charges, because they are not authorized by the facts in this case or no other case; and in making said charges, the Court misled the jury as to the law and the effect of their verdict, as they would not have found a verdict for murder in the second degree, if they had known that the punishment was death. The Court should have read the statute to the jury." (*Note by the Judge*: "The Court was not requested to read to the jury, the law defining the punishment of principals in the second degree.")

4th, "In charging what never was law, and in refusing to charge that crime can only be committed in Georgia, where there is a joint act and intent."

5th, "In recalling the jury without the consent of counsel, and reading his charge to them after they had been out in deliberation on the case for twelve hours; and in refusing to read paragraph 3793 of the Code, as requested by counsel;" and last, because the verdict was "contrary to law and without law, and contrary to evidence and the weight evidence, and without evidence."

The Court, after argument had, overruled said motion, refused a new trial, and sentenced the defendant to be hung.

This refusal of a new trial upon the grounds in said motion stated, is assigned as error.

H. MORGAN and J. A. DAVIS, for plaintiff in error.

N. A. SMITH, represented by N. J. HAMMOND, for the State.

WARNER, C. J.

The defendant was indicted and tried as the actual perpetrator of the crime of murder, which is the highest grade of homicide known to the law.

1. It is the duty of the Court, on the trial of a defendant for a violation of a public law, to give in charge to the jury, the law defining the offense. In this case the presiding Judge stated, "that he would not charge the jury as to the law relative to the different grades of homicide, because the counsel both for the *prosecution* and *State*, have here conceded that the perpetrator of this act is guilty of murder." The Court intended to say, we presume, that the counsel both for the *State* and the *prisoner*, have here conceded that the perpetrator of this act is guilty of murder. Still, that concession, if made, will not absolve the Court from the performance of its duty, where the life of the prisoner is involved, in giving to the jury the law applicable to the offense with which he is charged. In our judgment, when a defendant is charged with the crime of murder, it is the duty of the Court to give in charge to the jury, the law defining *that offense*, and if the evidence upon the trial will authorize it, but not otherwise, also to give in charge to the jury, the law defining the several grades of homicide as declared by the Code; so far as the evidence will authorize and is applicable to such inferior grades of homicide. But if there is *no evidence* which would authorize the jury to find a verdict for any grade of homicide of less degree than that of murder, then such charge ought not to be given. It is always the duty of the Court to charge the jury, the law applicable to the facts *proved* on the trial, and not upon an assumed state of facts *not proved* on the trial.

2. The next ground of error is, that the Court charged the jury that they could find the defendant guilty as principal in the second degree, upon the evidence in this record, when he was charged as the actual perpetrator of the crime, in the indictment. "A principal in the first degree is he or she that is the actor or *absolute* perpetrator of the crime. A principal

in the second degree, is he or she who is present aiding and abetting the act to be done; which presence need not always be an actual, immediate standing-by, within sight or hearing of the act, but there may be also a constructive presence, as when one commits a robbery, murder or other crime, and another keeps watch or guard at a convenient distance." Code, section 4204. Can a defendant, under our Code, who is charged as the *absolute* perpetrator of the crime, be found guilty as a principal in the second degree? We think not, for the obvious reason that the accusation does not *notify* him that he will be held responsible for such acts as will make him a principal in the second degree, and therefore he is taken by *surprise* at the trial. The accusation in the indictment only notifies him that he was to be held responsible as the *absolute perpetrator of the crime*, and at the trial he was prepared to meet *that charge*; but if under that charge, he can be found guilty as principal in the second degree, by proof of such facts as will make him such under the definition of the Code, then he has had *no notice* that he will be required to meet such evidence, or be prepared to rebut or explain it. But it is said the punishment is the same in both cases. In reply to that suggestion it may be said, that the punishment for murder and the willful, malicious burning of a house in a town or city, is the same; but the allegation in the indictment for each offence, would not be the same, although the punishment may be. In our judgment, the Code in defining who shall be a principal in the first degree, and who shall be a principal in the second degree, clearly contemplates that the party shall be indicted and charged with that degree of the offence for which the State seeks to convict him. If there is any doubt as to what the evidence may be on the trial, the safer course would be for the prosecuting officer to have two counts in his indictment, charging the defendant as principal in the first degree in one count, and as principal in the second degree in the other, as was done in *Commonwealth vs. Knapp*, 10th Pickering's Rep., 478. The case of *Hill vs. the State*, (28th Ga. Rep., 604,) has been cited in the argument. In that case, the defendant was indicted as the *principal perpe-*

trator of the crime, and the Court held that all the parties engaged in the transaction were principals, the stroke of one of the parties, being in law, the stroke of the other. What were the particular facts in that case, the report does not show. The principle asserted in that case, we affirm as an *abstract principle of law*, without any knowledge of the facts to which it was applied. If, however, the facts in that case were as assumed by Mr. Justice Stephens in his dissenting opinion, we concur with him in holding, "that under an indictment against one as principal in the first degree, there can be no conviction of him as principal in the second degree." Whether the evidence in that case was sufficient to make Hill a principal in the first degree, as he was charged in the indictment, or whether it only went to show that he was a principal in the second degree, we do not know, as there is no report of the evidence. The defendant in this case was indicted as the principal perpetrator of the crime, and in view of the facts disclosed by the evidence, the Court below should have instructed the jury, that if they believed from the evidence that it was the intention of the parties engaged in the difficulty between Proctor and Henderson to do an *unlawful act*, and the defendant in the prosecution of that intention, committed the homicide upon the deceased; or if they should believe from the evidence that the homicide was committed upon the deceased by either of the parties engaged in the prosecution of that common intention, then the jury might find him guilty—that is to say, guilty as principal perpetrator of the crime as charged in the indictment. That part of the charge of the Court below, instructing the jury that they could find the defendant guilty as principal in the *second degree*, "although not the party who used the knife," was error.

3. The verdict in this case finds the defendant guilty of murder as principal in the *second degree*, which is contrary to the allegation in the indictment, which charges him as the actual perpetrator of the crime. The verdict, therefore, does not speak the *truth* as to the issue formed upon the indictment, and is error.

Let the judgment of the Court below be reversed.

SAMUEL ADAMS, plaintiff in error, vs. WILLIAM H. ADAMS,  
defendant in error.

1. Under the provisions of the act of 1866, the County Judge has no jurisdiction to bind out colored minor children as apprentices, unless such minor children are residents of the county and their parents reside out of the county, or are dead, the profits of whose estate are insufficient for their support and maintenance, or their parents, if residing in the county, are from age, infirmity, or poverty, unable to support them.
2. When the mother and reputed father of illegitimate children have intermarried, and the father recognizes the children to be his, the children are rendered legitimate under the Code, and such father of colored minor children, the mother being dead, is entitled to the custody and control of them.

*Habeas corpus* from Dougherty County. Decided by Judge VASON, Chambers, February, 1867.

The petition of Samuel Adams alleged that he was the father of Tucker, Francis, and Zachariah Adams, minors, and that they were held in custody by William H. Adams, of Baker County, without any lawful authority, &c.

The answer admitted the custody of the minors as charged, except the unlawfulness of it. It set up that he held them by indenture from the County-Court of Baker County.

At the hearing, the petitioner in his own behalf swore that he was the father of said minors; that the oldest was about thirteen, and the youngest about eleven years old; that they were residing in Dougherty County until they were taken away by some one without his knowledge or consent, and taken possession of by defendant in Baker County; that witness lived with defendant in Baker County last year, where the children all lived; that he, they, and their mother belonged to said defendant while in slavery; that their mother and witness lived together as man and wife until she died, some time last summer; that after her death witness married another woman, who lived at Mr. Dykes', in Dougherty County, and witness having three other small children (by his first wife) who were unable to work, took them to his present wife for safe keeping; that the three in contro-

very had been engaged to defendant for that year, and were left with him until shortly before Christmas, when witness hired them to Dykes for \$150.00 for the year ensuing, and delivered them to Dykes, who kept them till the latter part of January, when they were taken away; that said defendant and Dykes were close neighbors; that when the children in controversy were born, witness had a wife at Thomas Pearson's, some two or three miles from defendant's residence, and witness went to see that wife Saturday nights; that when the two oldest children were born their mother had no husband, but habitually slept with witness all the time for two years before the birth of the oldest; that witness and said mother both lived with and belonged to defendant; that after the birth of the two oldest their mother married another man, named Taylor, who lived with Richard Griffin, but during this marriage witness continued to sleep with said mother as before, and before the youngest of the three in controversy was born, said Taylor died; that witness knows the children are his; he always claimed them, and said mother always called them his; that while witness and said mother were cohabiting, witness' wife was sold and carried away, and witness married another woman, Frances, and lived as her husband till she bore a mulatto child; then witness quit her and married the said mother of the children in controversy, and lived with her till her death, and as her husband and the father of the said children, always controlled and claimed them; that defendant owned said children (before they were free), and raised them, and had frequently since tried to get them from witness, but witness refused to let him have them; that the children in controversy are all able to support themselves.

Petitioner then introduced and examined ISAAC ADAMS, who testified that he was acquainted with petitioner, defendant, and the three children in controversy; that witness once belonged to defendant, and so did petitioner and the children and their mother, until they became free; that petitioner always claimed the two oldest children as his; witness heard that, to some persons, petitioner had disowned the



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children, but he never disclaimed them to witness ; that when the two oldest were born, and for a year or two before the birth of the oldest, petitioner and their mother usually slept together ; that witness had seen them go to bed together ; that during that time petitioner had a wife some distance from home, and went to see her on Saturday nights, but usually slept with said children's mother the remainder of the week ; that the mother always said the three children were petitioner's ; that after the birth of the two oldest, their mother married a man who did not live on the plantation with her, but some two or three miles away ; but this man died before the birth of the youngest of said three in controversy ; that during all this time petitioner continued to sleep with said mother as before ; that petitioner's wife was sold and carried away, and petitioner married another woman in the neighborhood, and kept her until she bore a mulatto child, and then quit her and married the mother of said children, and lived with her as her husband till her death ; that petitioner and said mother commenced some twelve years ago to live as man and wife ; and that defendant owned and raised the children.

On cross-examination, he testified that when negroes became free he heard the petitioner say said children in controversy were not his, and that he intended to take the three youngest, that were his, and would not take these three ; that petitioner did take said three youngest ones, and left the others as defendant's ; and that petitioner never had the mother of the children for a wife till about one year after the youngest of the three in dispute was born.

Plaintiff then examined ROBERT A. DYKES, who testified that he had been neighbor to defendant and knew the mother of said children and the children and petitioner for about six years ; and that said mother (till her death) and petitioner lived together as man and wife ; that they all lived with defendant till a short time before Christmas last ; that petitioner, having a wife at witness' house, hired said three children to witness for one hundred and twenty dollars and their board and clothing ; that the children came to his house shortly

before Christmas, and remained there under that contract till about the last of January or the first of February, when, in his absence, they were carried away from his house without his knowledge, approbation, or consent; that the next he heard of them defendant had them.

Plaintiff closed here.

Defendant examined SILAS ADAMS as a witness, who testified that he was defendant's brother; that he did not remember to have heard petitioner claim said three children as his, but heard him say last summer that they were not his; that petitioner and said mother were married about a year after the birth of the youngest of these children, and after said marriage had three other children, which petitioner took away some time last summer; that about a week before Christmas petitioner took the three in controversy from defendant's residence; that petitioner had a wife before these children were born, and went to see her; that she was sold and carried away; and petitioner married another woman and then quit her because she had a mulatto child; that petitioner then married the mother (of these children), and they lived as man and wife till her death, last summer; that petitioner was a great run-about after the women; that petitioner carried the children in controversy away from defendant's, in Baker County, and out of the county, without defendant's knowledge or consent, and against his will.

Defendant then swore in his own behalf that he owned all of said negroes while they were slaves, and they all lived with him last year, and the mother died last summer; that about a month before Christmas petitioner was of no service to witness, was running about in violation of his contract with witness; that before the children were born petitioner had a wife at a neighbor's, whom he visited as negroes do, and witness thought was there most of his time at night, as he was frequently missing at night; that about a year after the birth of these children petitioner, with witness' consent, married said mother, and lived with her as his wife till her death; that he had never conversed with petitioner on the subject, and knows not whether he had

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claimed or disclaimed these three children; that at the death of the mother, she, petitioner, and the children, all lived with defendant.

Defendant then read in evidence an indenture, made in Baker County (though the venue stated is Dougherty County), 2d February, 1867, between Benjamin F. Hudspeth, as Judge of the County-Court of said County of Baker, and defendant, whereby said children in controversy were bound as apprentices to defendant till their several majorities. The indenture recited that it had been made to appear to said Judge that said children were orphans, and left without any provision for their support, and were likely to become a charge to said county, and ended with recitals of his duty and obligation to clothe and educate them, and his power as guardian over them according to law. It was tested by "J. Quarterman."

The evidence here closed.

The Court restored the children to the custody of defendant.

To this decision and judgment petitioner excepted, and now says the Court erred—

1st. In holding said indenture binding; because it was not witnessed as a deed, and because it did not therein appear that said minors were residents of or domiciled in Baker County.

2d. In holding that said instrument was only voidable, and could not be collaterally attacked, but must be attacked in the County-Court of Baker County.

3d. Because the subsequent marriage of the petitioner and said mother legitimized the children, and gave petitioner a right to their custody.

4th. Because petitioner, as father of these illegitimates, was bound for their support and maintenance.

5th. Because the children were domiciled in Dougherty County, and if taken to Baker County the County-Court thereof had no jurisdiction over them, and said indenture might be therefore attacked in any form, when sought to be used.

6th. Because the mother has control of all her children while with her, and after her death the father of them has such control.

STROZIER and SMITH, for plaintiff in error.

WRIGHT and WARREN, for defendant in error.

WARNER, C. J.

1. Had the Judge of the County-Court of Baker County jurisdiction to bind out the three children as apprentices to defendant under the act of 17th March, 1866?

To have conferred jurisdiction upon the County-Judge of Baker County, these children must have been *residents* of that county, their parents dead, or residing out of the county, the profits of whose estate was insufficient for their support and maintenance. If their parents resided *in the County of Baker*, and from age, infirmity, or poverty were unable to support them, then the County-Judge would have had jurisdiction to bind them out as apprentices. This pretended indenture of apprenticeship is dated on the 2d day of February, 1867. The record discloses the fact that these children were removed from Baker County to Dougherty County by the petitioner a short time before Christmas, 1866, and hired to Dykes for \$150.00 for the year 1867, where they remained under his contract until the last of January, 1867, when they were taken away by some one without petitioner's knowledge or consent, and found in possession of defendant, who claims them as his apprentices under the pretended indenture set out in the record.

Upon this statement of facts, the County-Judge of Baker County had no jurisdiction to bind out these children to the defendant as apprentices. They did not reside in the County of Baker, but in the County of Dougherty, where they had been hired by their father for the year, for their board, clothing, and *wages besides*, so that there is no pretext that they would become chargeable to the County of Baker for their support and maintenance. This act of the County-Judge, binding these children as apprentices to defendant, was simply

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void, a mere nullity, and may be attacked whenever and in whatever way it is sought to be used as a valid act. Towns vs. Springer, 9th Geo. Rep., 130. \*

2. According to the facts stated in the record, these children were the *legitimate* children of the petitioner, and he had the legal right to their custody. By the 1737th section of the Code it is declared that "the marriage of the mother and the reputed father of an illegitimate child, and the recognition of such child as his, shall render the child *legitimate*; and in such case the child shall immediately take the surname of his father. The mother and reputed father of these children were married, the children recognized by him as his children, and the mother is dead. In our judgment, the petitioner is entitled to the custody and control of these children, and it was error in the Court below in remanding them back into the possession of Wm. H. Adams, the defendant.

Let the judgment of the Court below be reversed.

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GEORGE WASHINGTON, (negro,) plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

1. When a defendant is indicted for having or carrying concealed weapons at a particular time and place, it is not competent for him to introduce evidence upon the trial to prove that it was his general habit to carry his weapon about his person openly exposed to view.
2. When the Court charged the jury on the trial of a defendant for having and carrying about his person a concealed pistol, "that if the prisoner *had a pistol*, and it was in Dr. Paris' during the morning he was guilty, and they must so find him": *Held*, that this charge of the Court was error.

*Certiorari* from County-Court. Decided by Judge VASON. Dougherty Superior Court, January Adjourned Term, 1867.

The indictment charged George Washington with carrying on his person a pistol, in said county, on the 3d June, 1866, not in an open manner and fully exposed to view.

The State introduced and examined Dr. PARIS, who stated

that on said day, learning that defendant was engaged in a quarrel, in the dining-room of Paris' Hotel, he went there and asked defendant if he had a pistol; that defendant said "he had; that he always toted them things." That he then went up to defendant and lifted up defendant's coat, and saw the pistol in a belt, or pocket fastened in a belt, buckled round defendant's body—the pistol was immediately behind the hip—that defendant had on a loose summer coat, not buttoned; that witness did not think the pistol could have been seen without lifting up the coat; did not look to see if it could be seen from the outside through the coat; the pistol was a small pocket pistol; that the belt in which the pistol was fastened could be seen, but only when it was open and fully exposed to view could the pistol be seen.

The State closed.

JOHNNY MAJOR, sworn for the defendant, testified that on said day, before defendant went to the hotel for Mr. Pulaski's dinner, witness saw him in Pulaski's store, and that defendant at that time had his pistol on his person fully exposed to view; that he saw defendant at the store about an hour before dinner, and saw the pistol buckled round him, and defendant at that time had on a coat; also late in the evening of same day defendant had the pistol openly and fully exposed to view in a belt, on the front side of his hip, where any one who looked at him could see it.

H. MORGAN, introduced by the defendant, testified that the defendant was in his employment, and "had been instructed and authorized by him to wear a pistol, but was instructed to wear it openly." This he did because persons were robbing his garden, and he instructed defendant to guard it, etc.

Defendant proposed to prove by SAMUEL POLFUS and others, "that he always had, and did on the day charged, carry his pistol openly and fully exposed to view, and that if it was at any time concealed, it was not intentional." Upon objection taken, this evidence was rejected by the Court.

The record recites that the Court "charged the jury in substance, that if the prisoner had a pistol and it was in Dr.

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Paris' during the morning he was guilty and they must so find him."

Defendant was found guilty, and sentenced to pay a fine of fifty dollars and costs, or in default thereof, to be imprisoned in the common jail for six months.

The case came before Judge VASON on *certiorari*, which assigned as error the rejection of the evidence aforesaid and said charge of the Court. The judgment below was affirmed and a new trial refused, and for this plaintiff in error assigns error in the bill of exceptions.

H. MORGAN, for plaintiff in error.

N. A. SMITH, for the State.

WARNER, C. J.

1. There are two grounds of error assigned to the judgment of the Court below in this case. First, that the County-Court, before which the defendant was tried, for having and carrying about his person a pistol concealed, in violation of the 4413th section of the Code, committed error in ruling out the evidence of Samuel Polfus and others, "that the defendant always had, and did on the day charged, carry his pistol openly and fully exposed to view, and that if it was concealed at any time, it was not intentional." The offence consists in *having* or carrying about the person a *concealed* weapon. Did the defendant *have* the pistol upon his person *concealed* at the time charged? The evidence shows that the defendant had a quarrel in Dr. Paris' dining-room at the time he is charged with *having the pistol concealed*, and the question was, whether it was concealed upon his person at *that time*, within the true intent and meaning of the statute, not whether he was in the *habit* of carrying it openly exposed to view at other times. Was the pistol *intentionally* concealed upon his person at the time charged? This question must be answered by the facts proved at that time, by the witnesses who saw them, and not by the general habits of the defendant in carrying his pistol at other times. There was no error in the rejection of the testimony offered.

2. The second ground of error is to the charge of the Court to the jury. The record states, "that the Court charged the jury in substance, that if the prisoner had a pistol and it was in Dr. Paris' during the morning, he was guilty, and they must so find him." This charge of the Court was error. The offence, under the Code, does not consist in *having a pistol* in Dr. Paris' room or house during the morning, but the offence consists in having a pistol (except horseman's pistols), about his person there not fully exposed to view—that is to say, having a pistol *concealed* about his person. The jury were instructed by the Court, that if the defendant *had a pistol* in Dr. Paris' during the morning he was guilty, and they must so find him, without calling their attention to the fact that, to constitute the offence, the pistol must have been *concealed* about his person. The fact that the defendant had a pistol in Dr. Paris' house during the morning, was not an offence under the Code for which the jury could or ought to have found the defendant guilty. The Court should have charged the jury, that, if they believed from the evidence, that the defendant had the pistol *concealed* about his person in Dr. Paris' house during the morning, and not in an open manner and fully exposed to view, then they might find him guilty. The having or carrying the pistol about the person of the defendant *concealed*, constitutes the offence under the Code. Let the judgment of the Court below be reversed.



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Rutherford vs. Newsom.

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**JAMES RUTHERFORD**, plaintiff in error, vs. **JAMES NEWSOM**, defendant in error.

1. A verdict will not be set aside (and a new trial granted) as being contrary to evidence, where the case has been fairly submitted to the jury on its merits, and no rule of law was violated nor manifest injustice done, although there may appear to have been a preponderance of evidence against the verdict, especially if the Judge who tried the cause is satisfied with the finding.
2. Whilst this Court will maintain its right and duty to grant a new trial in all cases, where the verdict is strongly and decidedly against the weight of evidence, and manifest injustice has been done, yet, as a general rule, it will be extremely cautious in interfering with the verdicts of juries, upon the ground that they are contrary to evidence and the weight of the evidence, when no rule of law has been violated.

*Complaint* Motion for new trial. Decided by Judge CLARK, Quitman Superior Court, November Term, 1866.

On the fourteenth day of June, 1854, James Rutherford bought from James Newsom, as agent for E. R. Graddy, a negro man named Joe, for nine hundred dollars, gave therefor his promissory note for that sum, payable to E. R. Graddy or bearer, on the first day of January thereafter, and took from said Newsom, as such agent, a bill of sale in the usual form, warranting said Joe sound in body and mind.

Newsom brought suit upon said note, and Rutherford defended on the ground that said slave was at said time unsound in body, and worthless.

At the trial, plaintiff read in evidence the note, and closed.

The defendant read in evidence the bill of sale, and then the answers of plaintiff obtained by discovery at common law.

In those answers, plaintiff testified that, as trustee for E. R. Tinsley, then wife of Haywood Graddy, he ratified an agreement for the sale of said slave, made by Dr. L. Newsom with the defendant, by receiving said note and giving said bill of sale; that the note still belonged to his sister, said *cestui que trust*; that at that date Graddy and his wife had parted; Graddy had delivered to plaintiff, as trustee for

his said sister, certain property, including said slave, and she was then suing Graddy for a divorce.

Defendant then read in evidence the answers of MARY ANN HOWARD to interrogatories. She testified that she knew the parties, and a slave named Joe, who once belonged to Elizabeth and Haywood Graddy, and that she thought she knew him three or four years while he belonged to them. She could not state positively when the slave went out of their possession, but, to the best of her recollection, it was in 1853 or 1854, and she thought he then went into defendant's possession; that the slave was in defendant's possession, she thought, about two years. She had heard the negro was dead.

As to his health, she said she had frequently heard him complain of being sick, and he complained of a pain in the breast, head and back. Witness was then living with her brother-in-law, William Graddy, where said negro had a wife; and he would occasionally lay up for a short time while there, saying he was sick, and complaining as afore-said; he would sometimes come to witness and her sister and ask for camphor, something to take for colic. Witness had never heard Haywood say anything about Joe's health, but had heard Elizabeth Graddy say Joe was frequently sick--this was while Joe was in possession of Haywood and Elizabeth Graddy.

Upon cross-examination, she stated that she had heard Joe make similar complaints while in defendant's possession; that she was not related to defendant or his wife, and did not know what became of Joe except by hearsay.

MARIA L. GRADDY, in answer to interrogatories for defendant, testified that she knew Joe three or four years, while in possession of Elizabeth and Haywood Graddy; that he went out of their possession into that of defendant, she thought, in 1854, and remained in his possession from about the first of that year to about the end of 1855. Witness said she should think Joe's health was rather bad, for he often complained of severe misery in his back and breast; he had for several years a wife at witness' house, and when

there, he would often lay up for several days at a time, and complained of a misery in the back and breast. Witness is sister-in-law of Elizabeth R. and Haywood Graddy.

Said negro was often sick while in possession of said Elizabeth and Haywood; witness never heard Haywood Graddy say anything about Joe's health, but heard Elizabeth Graddy say that Joe frequently lay up and complained as above stated; never heard her say what she thought the disease was; she only said the negro was sick and complained of pains in the back and breast. The negro died shortly before Christmas, 1855, in defendant's possession, and about two years after defendant got possession of him.

Cross-examined, she said she had often heard Elizabeth Graddy speak of Joe's health, both at her own and witness' house, and remembers particularly one time she came to witness' house to see Joe while sick, and said he had such attacks frequently; Joe at that time was sick, and complained of misery in the back and breast. No one else that witness remembers was present at that conversation except her sister Mary. Witness knows not of what disease the negro died, nor whether any one attended him in his last illness; defendant was at witness' house when a runner came for him and said Joe was dying, and defendant left at once for home; defendant was at that time a practicing physician, though he never attended Joe as a physician before he bought him, so far as witness knew, and if he knew anything as to Joe's health before buying him, witness does not know it.

The defendant then introduced EDEN JACKSON, who testified that he knew Joe when he saw him, while he belonged to Haywood and Elizabeth R. Graddy, perhaps three or four years, but did not become well acquainted with him till 1853. Witness overseed for William Graddy in 1853, and he hired Joe for that year, and Joe was under witness' supervision that year. Joe was sick frequently, and was attacked suddenly, and when attacked complained of pains in the back and breast, and during that year lost a good deal of time on account of sickness; that when he was chopping cotton, he got into the grass because Joe was sick, and when pulling

fodder Joe was taken with the same kind of sickness, and gave him no aid therein till the last day of fodder-pulling. Witness also overseed for William Graddy in 1854, and Joe went into defendant's possession latter part of 1853 or former part of 1854. Witness overseed for defendant in 1855, and again had Joe under him and worked with him; in that year Joe had frequent and sudden attacks of sickness, and complained of pains or misery in the back and breast, as he had done in 1853, with this difference, however, that his attacks were more frequent, and that Joe lost a good deal of time from his old complaint in 1853. Joe was not better than half a hand in the farm; a good hand was worth one hundred and fifty dollars per annum, and Joe only half that, because of his sickness. Joe died in December, 1855; on the morning of his death he and witness were killing hogs, and had killed two, when Joe was taken suddenly sick of his old complaint, clapped his hand to his breast, complaining of pain in his breast, and squatted down.

Soon after, witness and Joe took up the hogs and carried them down to a place where they were to scald the hogs, and witness went up to his house to change his pants or put on another pair over those he had on, and a negro woman ran and told witness Joe was dying. Witness went to him immediately, and Joe drew his last breath immediately upon witness' arrival. From what witness saw and heard on that occasion, he says Joe died of his old disease.

He further testified that Wm. Graddy worked six or seven hands in 1853, and cultivated two hundred acres of land; that defendant resided about a mile or a mile and a half from Wm. Graddy, to go round, but perhaps nearer through; that defendant was a physician, and in 1855 worked ten hands, (including witness,) three of them small, ranging from ten years old up, the other seven were older, and defendant had in cultivation between two and three hundred acres of land.

WILLIAM GRADDY was then introduced by the defendant. He testified that he was Haywood Graddy's brother, and knew Joe when in possession of Haywood and his wife Elizabeth R., and that Joe then had a wife at witness' house.

Joe usually came to see his wife about twice a week, and was frequently taken down sick while there, and complained of pains in the back and breast; that he hired Joe in 1853 from his brother Haywood, hired him as a diseased or unsound negro, was to pay for hire ten dollars per month, deducting for all lost time on account of Joe's sickness or from Joe's running away—Joe ran away for one week, and that and his sickness reduced his hire to sixty-five or seventy-five dollars. Witness gave up Joe in September or October of the year. Haywood and his wife had separated; she was about going to Texas, and Joe fell to her in the division. Witness gave up Joe to Haywood (after he had kept him nine or ten months,) to be delivered up to Elizabeth R. Graddy. Defendant was witness' family physician, and as such visited any of his family when sick, but neither defendant nor any other physician was sent for to see Joe when he was sick. Witness does not know that defendant knew Joe was unsound; he called when sent for to see sick persons at witness' house, but they nor their families visited each other.

Before James Newsom started with his sister Elizabeth R. Graddy to Texas, he proposed to sell said Joe to witness; witness told him he had not the money to buy Joe, and if he had he would not buy him, because he considered Joe unsound—that knowing Joe as well as he did, and knowing he was unsound, he would not give three hundred dollars for him and take the risk, and that he did not wish to own any such diseased negro.

Here defendant rested his case.

Plaintiff introduced Dr. JAMES W. MEROER, who swore that in the early part of 1854 Dr. Newsom sent Joe to defendant to see if he would buy Joe, and hearing that he probably would, Dr. Newsom sold him and delivered him to defendant (subject to ratification of plaintiff when he returned from Texas,) at \$800.00 cash, or \$900.00 credit till 1st January ensuing. Plaintiff returned in June, 1854, and completed the trade by delivering Joe under said bill of sale and taking said note.

Plaintiff left said note with witness for collection, and de-

defendant learned that he had the note, and when it was due (in January, 1855,) the defendant called on witness and said he had promised to pay it punctually, that his cotton was in Eufaula, that cotton was down and he did not wish to sell then, but would pay it by the first of March, 1855. Defendant failed to pay at the appointed time; about the first of May witness called defendant's attention to it, and defendant, after some hesitation, said he had consulted his attorney, and he had advised him it would be better not to pay the note until the suit then pending between Elizabeth B. Graddy and her husband for divorce was ended, for fear of some difficulty about the title. Defendant seemed concerned about the title, but said nothing about Joe's being unsound or diseased.

Plaintiff next examined THOMAS W. SANDERS, who testified that he knew Joe while he belonged to Haywood and Elizabeth R. Graddy, and in 1853 when William Graddy had him, and thought he was a good hand, but knew nothing about his soundness or unsoundness.

CHARLES L. MATTHEWS then testified for plaintiff: that he knew Joe while in defendant's possession slightly; occasionally saw him at work in defendant's farm—witness and defendant farmed on adjoining farms, and witness lived about a quarter or half mile from him; he thought Joe was a good hand; occasionally saw him with defendant's six or seven other hands working near witness' farm, but witness knew nothing about Joe's health. Defendant cultivated about two hundred and fifty acres of land.

The evidence closed here, and the Court charged the jury as follows. After stating the issue between the parties, he said, that they were to inquire, "1st. Was Joe unsound at the time of the sale?" 2d. To what extent, if unsound, did said unsoundness affect his value? If he was so unsound as to destroy his value, plaintiff should recover nothing; if, though unsound, he was not wholly worthless, plaintiff's demand should be reduced in proportion to the diminution of value by such unsoundness.

2d. In determining whether the negro was sound or not at

the time of the sale, the jury were to be governed by the evidence only.

3d. If you believe from the evidence that Joe was diseased before he went into defendant's possession, and afterwards, and died of the same disease, you may find that he was diseased at the time of the sale.

4th. Any complaints made by such slave, as to physical disorder, would be evidence on the point. If such complaints were made concerning the same kind of disorders, through a long period before the sale and until the sale, and eventually some months thereafter the negro suddenly died, making the same kind of complaints, that would tend to show long standing disease.

5th. On the other hand, if defendant, being a physician, and having had the negro in his possession long enough to be well acquainted with his condition, did, after the note fell due, repeatedly recognize his liability therein and provide to pay the whole of it, making no complaints of the negro's unsoundness at the time, this is evidence tending to show that the negro was sound.

6th. These are a part at least of the considerations which you are to weigh concerning the question of fact involved. I am not at liberty to give you an opinion; you are the sole judges thereof. Consider candidly all the evidence, and decide, was the slave sound at the sale? If so, find for the plaintiff the amount of the note and its interest. If the negro was unsound at that time, and to such an extent as to be wholly worthless, find for defendant. If he was unsound, but still of some value, find for plaintiff what is due, after deducting what the proof shows should be taken off for such unsoundness."

Counsel for defendant requested the Court, in writing, to charge, that if the negro was diseased at the time of the sale, the jury cannot find more than said negro was proved to be worth in his diseased condition.

The Judge declined so charging, on the ground that the jury were sufficiently instructed on this point in the last sentence of paragraph 1st, and in the last sentence of paragraph

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6th of said charge, and he did not refuse it in presence of the jury, but simply declined to give it, and afterwards told counsel why he declined.

The jury found a verdict in favor of the plaintiff for six hundred dollars, with interest.

A new trial was moved for, on the ground that the Court erred in charging paragraph 5th aforesaid, and in refusing to charge as requested as aforesaid, and because the verdict was strongly and decidedly against the weight of evidence, contrary to law and contrary to the law and evidence.

It is stated in the bill of exceptions that a motion for new trial was made and a new trial was refused.

The plaintiff in error assigns for error that the Court erred—

1st. In its charge to the jury as aforesaid.

2d. In declining or refusing to charge as requested as aforesaid.

A. HOOD and B. S. WORRILL, for plaintiff in error.

J. L. WIMBERLY and E. H. BEALL, for defendant in error.

WARNER, C. J.

1. The error assigned in this case is the refusal of the Court below to grant a new trial. In *Lang vs. Brown*, (29th Ga. Rep., 628,) this Court stated the rule to be, "that a verdict will not be set aside and a new trial granted, as being contrary to evidence, when the case has been fairly submitted on its merits, and no rule of law has been violated, or manifest injustice done: although, there may appear to have been a *preponderance* of evidence against the verdict, especially if the Judge who tried the cause is satisfied with the finding." The questions of fact submitted to the jury in this case was the soundness or unsoundness of a negro slave at the time of the sale, and if unsound, to what extent did that unsoundness impair his value. The verdict of the jury finds that the slave was unsound at the time of sale, and that his value was



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impaired in consequence thereof three hundred dollars. We find no error in the charge of the Court in view of the facts of this case, but, on the contrary, think the law and the facts were fairly submitted to the jury by the Court; and although there may have been a preponderance of evidence as to the unsoundness of the slave, the extent of that unsoundness, and how far it diminished his value, was a question of fact exclusively for the consideration of the jury.

2. While this Court will maintain its right and duty to grant a new trial in all cases where the verdict is strongly and decidedly against the weight of evidence, and manifest injustice has been done, yet, as a general rule, it will be extremely cautious in interfering with the verdicts of juries, upon the ground that they are contrary to evidence and the weight of the evidence, when no rule of law has been violated. A reviewing Court cannot as fully understand from the record the credit to which witnesses are entitled, the manner of giving in their testimony, their relation to the parties, and the bias under which they testify, as the court and jury who witness the trial of the case in the court below. The administration of the law in the courts should be a *practical* business for the obtainment of justice, according to law. The rights of the parties in this case having been fairly submitted to the jury upon the trial thereof, and no rule of law having been violated, the presiding Judge being satisfied with the verdict, this Court will not disturb it. Let the judgment of the Court below be affirmed.

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Rawson vs. Powell.

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CHARLES W. RAWSON, plaintiff in error, vs. JAMES W. POWELL, defendant in error.

When at a regular term of the Superior Court, held in the month of May, the Court, not being able to get through with the business on the dockets, adjourned the Court over to the third Monday in August thereafter in due form of law: held, that parties and their attorneys having business in that Court were bound, at their peril, to take notice of the meeting, and adjournments thereof, and that this Court will not control the discretion of the Court below in refusing to reinstate a case dismissed for want of prosecution at the adjourned term of the Court, upon the statement of the plaintiff's attorney that he had no knowledge of such adjourned term of the Court.

Motion to reinstate case. Decided by Judge CLARK, Superior Court of Terrell County, November Term, 1866.

At May term, 1866, of said Court, the case of Charles W. Rawson against James W. Powell was on the appeal; it had been continued twice on the appeal by the defendant, but never by the plaintiff, since the appeal, and defendant had been put on terms to try the case at said term.

Judge Lyon (of Lyon & Irwin), plaintiff's attorneys, attended said term till a criminal case of importance being on trial, he concluded that no civil business could be tried, and left the Court. Mr. Irwin was, during said term, absent from the State, and sick. Lyon had no knowledge of an intention to hold an adjourned term of said Court. But an adjourned term was held eighty days thereafter, in August. Lyon stated that he had no notice of it; but the record shows that the adjourned term was regularly ordered before the Court rose in May; it was proclaimed by the Sheriff when the regular term was adjourned, and afterwards advertised sometime before the meeting of the term in "The Dawson Journal," in said county.

The case was called in its order, and upon motion of defendant's attorney was, by order of the Court, dismissed for want of prosecution. Plaintiff moved to reinstate the case upon the facts aforesaid, which motion was overruled by the Court. And this action of the Judge in refusing to reinstate said case is brought here as error.

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LYON and IRWIN, for plaintiff in error.

B. WOOTEN, F. M. HARPER, for defendant in error.

WARNER, C. J.

We cannot control the discretion of the Court below in refusing to reinstate the plaintiff's case upon the statement of facts in this record, without establishing a precedent that will produce bad results in conducting the business of the Courts. The main ground on which the motion is based is, that the plaintiff's counsel left the regular term of the Court before its adjournment, and when the Court did adjourn it was to the third Monday in August, eighty days thereafter, of which adjourned term of the Court in August the plaintiff's counsel states he had no notice, and was not in attendance upon the Court. The Court, however, was adjourned over from the regular term in May to the third Monday in August in *due form of law*, notice of which adjournment was published in a public gazette published in the circuit. By the 3167th section of the Code, it is made the duty of every Judge of the Superior Court to hold an adjourned term in any county within their respective circuits where the business requires it to clear the dockets.

By the act of 17th December, 1861, the holding adjourned terms of the Court for the disposition of the business upon the dockets, rests in the sound discretion of the presiding Judge. Whether the plaintiff in the case had notice of the adjourned term of the Court or not, the record is silent. The Court being a place where justice is judicially administered, all parties and their attorneys having business therein are bound at their peril to *take notice* of the meeting and adjournments thereof in accordance with the public laws of the State.

Let the judgment of the Court below be affirmed.

Rust, survivor, &c., vs. Garmany, agent, &c.

Y. G. RUST, survivor of SIMS & RUST, petitioner, vs. G. W. GARMANY, Agent of THE MECHANICS AND LOAN ASSOCIATION.

When a case has been heard and decided in this Court, (the Court having jurisdiction of the parties and the subject matter as provided by law,) its judgment is final and conclusive as to the rights of the parties in that case, and a re-hearing will not be allowed.

Petition for re-hearing in Supreme Court.

George W. Garmany, as agent of the Mechanics and Loan Association, was plaintiff in error against this petitioner, seeking to set aside a decision of Judge Vason, made in November, 1866, in a possessory warrant for fifty-four bales of cotton.

The case was returnable to December Term, 1866, of this Court, and at that term the judgment below was reversed.

Now comes the petitioner and avers that the bill of exceptions in that case, did not contain all the facts material to a clear understanding of the cause; that this Court mistook the application of the facts which it did contain, to the law of the case; and prays this Court to re-examine the premises, and reverse its said judgment.

LYONS, DEGRAFFENREID & SHORTER, for petitioner.

No appearance for the defendant.

WARNER, C. J.

This is an application for the re-hearing of a cause heard and decided by this Court at the last December term, 1866, upon the *alleged* ground that the bill of exceptions then before the Court, did not contain all the facts material to a clear understanding of the case; and that this Court mistook the application of the facts which it did contain, to the law of the case.

If the bill of exceptions did not contain all the facts, the party had his remedy, if any, when the case was before the Court at the former term. It is too late to complain now.

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Engel vs. Speer.

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When a cause has been heard before this Court and decided by it, (the Court having jurisdiction of the parties and the subject matter as provided by law,) its judgment is *final* and *conclusive*, as to the rights of the parties in *that case*; and a re-hearing thereof upon the *alleged* ground that the Court mistook the application of the facts to the law of the case, will not be allowed.

Let the application for re-hearing be dismissed.

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JOSEPH ENGEL, petitioner, vs. ALEXANDER M. SPEER,  
Judge of the Flint Circuit.

A *mandamus nisi* to a Judge of the Superior Court, will be refused when the parties to the suit by their written agreement, for their mutual convenience, did not present a bill of exceptions for his certificate and signature, until six months after the adjournment of the Court at which the trial was had.

Mandamus to compel the signing and certify of a bill of exceptions.

Asher Schuerman obtained a verdict against Joseph Engel at the November Term, 1866, of Spalding Superior Court. Engel moved for a new trial, which was refused.

On the first day of June, 1867, Engel's attorneys presented to Judge Speer, who presided at the time and overruled the motion, a bill of exceptions.

The Judge refused to certify it, because it had not been presented within thirty days from the adjournment of the Court, and, as he stated, because so long a time had elapsed since the trial, that he had forgotten the facts and law involved in the case.

To this it was replied, that the motion for a new trial was on file, and contained all the evidence and all the law points taken in the case; and that the attorneys for the parties had, in writing, waived the time, for their mutual convenience.

Such are the facts stated in a petition, unverified, (though

not contradicted by Schuerman's attorney,) and upon them alone a motion for *mandamus* to compel Judge Speer to sign and certify the bill of exceptions, was predicated.

W. K. DEGRAFFENREID, C. PEEPLES, for petitioner.

O. A. LOCHRANE, represented by A. O. BACON, *contra*.

WARNER, C. J.

This is an application for *mandamus nisi* against Judge Speer under the 4166th section of the Code. This section of the Code provides, that if from any cause, a bill of exceptions is not certified by the Judge, *without fault of the party tendering the same*, he may apply to this Court for *mandamus*, etc. The petition for *mandamus* must set out substantially the bill of exceptions tendered, and shall be *verified* by the attorney as to the truth of the bill as tendered, and by the party or his attorney, as to the other facts stated therein.

This application is not verified by the oath of anybody; but it is not excepted to on that ground by the opposite party. It appears, however, upon the face of the application, that six months had elapsed from the time of the trial in the Court below, until the bill of exceptions was presented to the presiding Judge, who refused to sign and certify the same because it had not been presented to him within thirty days from the adjournment of the Court, and that so long a time had elapsed since the trial, that he had forgotten the facts and law involved in the case.

But it is insisted here, that the attorneys of the parties had in writing, *waived* the time, for *their mutual convenience*, and that all the evidence and law points taken in the case, were on file in the Clerk's office. Upon the state of facts apparent on the face of this application, can it be said that this bill of exceptions was not certified and signed by the presiding Judge within the time prescribed by law, *without the fault of the party tendering it*?

The reply is, that *the parties* agreed in writing, for *their mutual convenience*, to waive the time. The answer is, that parties by their agreement, for their mutual convenience, can-

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not *repeal* the law, which requires the bill of exceptions to be presented within *thirty days* after the adjournment of the Court, and present the same *six months thereafter*. The presiding Judge has certain rights under the law, of which the parties, for *their mutual convenience*, cannot deprive him. Creditors and other parties interested in the judgments and proceedings of the Court below, may have rights under the law, of which the parties by their agreement, for *their mutual convenience*, cannot deprive them.

Let the application for mandamus be refused.

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ARCHIBALD KISER, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

When a case is brought before this Court by a written agreement of the counsel of the parties, alleging that certain errors were committed in the Court below, without any certificate of the presiding Judge that the same is true and consistent with what transpired before him in the Court below, the case will be dismissed.

*Sci. fa. Certiorari* from the County-Court of Sumter County. Decided (as is alleged) by Judge VASON, at Chambers.

The papers in this case are as follows :

A bond made 25th September, 1866, by James Kiser principal, and Archibald Kiser and George W. Kiser securities, containing this condition: "Whereas, the above bound James Kiser has been arrested upon a warrant for the offence of larceny from the house \*\*\*\*\* , now if said James Kiser be and appear at said term of the County-Court to be holden on 2d Monday in November next \*\*\*\*, to answer said charge, then this bond to be void, else to remain in force:"

A bill of indictment found at November term, 1866, of said County-Court, which contains the names of but thirteen grand jurors, and charges that on the 24th September, 1866,

in said county, said James Kiser "did in the storehouse of G. M. Hay, privately steal one pair of boots, of the value of ten dollars, the property of said G. M. Hay:"

*Scire facias*, in which it was alleged that the condition of said bond was, that James Kiser "should answer to a bill of indictment" for the offence of larceny from the house, &c. (On this, George W. and Archibald Kiser were served. James was not found :)

"It is agreed that at the January term, 1867, this case (the *scire facias*) was set down for a hearing and decision at Chambers, on the 28th January, 1867, when, in the absence of W. Hawkins, from providential cause, the State took judgment of forfeiture; that on the 17th April, 1867, his Honor, for the reason of said providential absence, reopened said case for a hearing, when defendants objected to said judgment, and to the entering up the same, upon the following grounds, to wit :

"1st. Said bill of indictment is wholly defective, in not being returned by eighteen grand jurors.

"2d. That said bond is illegal and void, for uncertainty in not stating the offence with which defendant was charged.

"3d. That the *scire facias* is illegal, because it does not recite the bond.

"All of which was overruled. The Court let said judgment be entered, and the former judgment of forfeiture was affirmed. (Signed)

W. A. HAWKINS, Defendant's Attorney:"

"April 17th, 1867.

The County-Solicitor in writing agreed to these facts, and consented that the *certiorari* to the Superior Court be heard on them, and the copy bill, copy bond, &c., attached to said agreement :

Then there was what purported to be a judgment of affirmation by Judge VASON, Sumter Superior Court, April term, 1867:

And lastly, "We agree that the case, to wit: the decision of the Superior Court affirming the judgment of the Court below, may be heard in the Supreme Court of Georgia upon



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the original *certiorari*, the indictment, the bond and *scire facias*, without a bill of exceptions, reserving to the State the right to insist upon the point that there was no *certiorari* in the Court below." This was signed by W. A. Hawkins, defendant's attorney, and N. A. Smith, Solicitor General Southwestern Circuit.

There was no certificate of the Judge, nor of the Clerk of either the County-Court or Superior Court.

W. A. HAWKINS, for plaintiff in error.

N. A. SMITH, Solicitor General, for the State.

WARNER, C. J.

This case is brought before this Court upon a written agreement of the counsel of the parties, alleging that certain errors were committed by the Court below, without any certificate of the presiding Judge as required by the 4161st section of the Code. To allow a case to be heard in this Court upon the agreement of the counsel, as to the alleged errors committed in the Court below, without the sanction of the presiding Judge, might do him great injustice. Before a case can be heard in this Court upon such an agreement for alleged error, it must first receive the sanction of the presiding Judge that it is true.

There being no certificate of the presiding Judge as to what he did decide in the Court below, or whether this agreement of the counsel is true and consistent with what transpired before him, the case must be dismissed.

GEORGE W. HENDERSON, plaintiff in error, vs. WILLIAM H. TURNER and JOHN W. HOWARD, defendants in error.

When the facts stated in a bill for relief and injunction entitle the complainant to the *special assistance* of a court of equity, for the protection of his rights, a demurrer to the bill will be overruled and the injunction continued.

Demurrer to bill for account and injunction. Decided by Judge CLARK. Terrell Superior Court. November Term, 1867.

The bill makes this case: William Henderson, of Terrell County, Georgia, died in 1852, intestate, leaving a large estate in lands, negroes, horses, mules, stock of every kind, farming implements, produce of all kinds, money, notes and accounts, amounting to sixty-five or seventy thousand dollars.

Complainant is entitled to one-third of said estate. John T. Howard (one of the defendants) of Early County, by virtue of letters of administration thereon, took possession of all of said estate.

Howard also became guardian of complainant, who was then a minor, aged seven or eight years; the bond which he gave as such guardian, was in the sum of forty thousand dollars, and had for Howard's securities, William H. Turner and William W. Turner and others to complainant unknown, and was made in 1853, or thereabout.

As such guardian, said Howard also took into possession the estate which complainant's mother had inherited from her father, and which she possessed at her death, which occurred some two years after the death of complainant's father.

In 1858 or 1859, about the first of January, the Court House of Lee County was burnt, and all the records concerning said estates and said bond, were destroyed,—at least they cannot now be found. Thus there is no trace of said estate, nor of what said guardian received, nor of what complainant is entitled to from said estates.

Before this fire, Howard's residence was cut off from Early County into the new county of Terrell, created by the Gen-

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eral Assembly of the State. No steps were taken to have the records relating to said estate or guardianship removed, or transcribed on the records of said new county. Howard has made no returns in Terrell County except for 1858 and 1859, showing nothing thereby but his expenditures as such guardian for those two years, and a return as administrator as aforesaid, of the sale of some perishable property of complainant's father's estate.

Howard refuses to say who else was security on said bond, and when asked to settle with complainant, replies that nothing is left for him.

The property received from the father's estate by said guardian for complainant, was worth twenty-five thousand dollars or other large sum of money, and was kept together and used in raising cotton, corn, etc., by said guardian, out of which the guardian has realized annually a net profit of five thousand dollars, or other large sum of money. And the share of complainant in his mother's estate was worth fifteen thousand dollars or other large sum of money, and went into Howard's hands as such guardian, and Howard has received the annual profits or interest on the same, to-wit: one thousand dollars, or other large sum of money, annually.

Lately Howard sold some mules belonging to the father's estate, to persons unknown to complainant, took notes for the same, amounting to eight or nine hundred dollars, and refuses to deliver said notes to complainant.

Complainant did not become of age till 4th April, 1866. Howard kept concealed from him the condition of his property, and fraudulently converted it to his own use and wasted the same.

Howard is hopelessly insolvent, and William W. Turner, one of said securities, died wholly or nearly insolvent, and complainant has to rely upon William H. Turner alone.

William H. Turner took from Howard about 1859, a mortgage on land lots two hundred and thirty-three and two hundred and thirty-five, and one hundred and fifty acres of land lot two hundred and sixteen, in the third district of Terrell

County, and various negroes, to save himself harmless from his said suretyship.

William H. Turner resides in Terrell County, owns and cultivates a valuable plantation, (where he resides,) and has stocks and other property, all of the value of thirty thousand dollars. William H. Turner has been cognizant of Howard's mismanagement of complainant's property and of his spending and wasting the same, and has assisted him 'therein, and has traded with Howard for the property coming to complainant from his mother's estate, which Howard held as such guardian, and complainant believes, has received from said Howard, other property of complainant amounting to a large sum in value, and he is combining with Howard to cheat and defraud complainant. William H. Turner says he will not respond for anything on said bond; and to avoid his responsibility thereon, threatens to sell, dispose of and secrete his property, so that it cannot be reached by a judgment or decree thereon; and complainant believes that he intends to carry said threats into execution.

Without this property in Howard's hands, complainant is penniless; and without William H. Turner's property to rely upon for indemnity, he is remediless, and he cannot reach the same at law.

A large portion of the property received from the estate of complainant, was negroes; by emancipation they are worthless, and nothing is claimed for their loss.

The prayer is for account and settlement; that Howard be enjoined from disposing of said notes, and William H. Turner enjoined from carrying out his said threats, or changing the present status of his property. Discovery is waived.

This bill having been sanctioned and injunction having issued according to the prayer, and been served on William H. Turner, he demurred on the following grounds:

- 1st, There is no equity in said bill.
- 2d, The bill shows that complainant has an adequate common law remedy.
- 3d, The injunction was improvidently granted.
- 4th, The bill is multifarious, mixing up incongruous and

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incompatible matters, in which the various defendants did not act jointly and in concert, and in which they have no common or mutual interest, and in which they have incurred no joint liability.

5th, Because the allegations, statements and charges contained in said bill, are general, vague, uncertain and indefinite, and present no issuable points or facts, thereby rendering said bill fishing in character.

The Court sustained the demurrer and ordered the bill dismissed; and this the plaintiff in error assigns as error.

WRIGHT & WARREN, WOOTTEN & HOYLE, for plaintiff in error.

A. HOOD, F. W. HARPER, for defendant in error.

WARNER, C. J.

The error assigned to the judgment of the Court below, is the sustaining the demurrer to complainant's bill, and dismissing the same. The *special facts* alleged in this bill, in our judgment, make a strong case for the interposition of a court of equity for the relief of complainant. See 3014, 3028, 3063, 3082, 3103, 2558, sections of the Code. The facts stated in the complainant's bill (which the demurrer admits to be true,) entitle the complainant to the *special assistance* of a court of equity for the protection of his rights. The demurrer to the bill, therefore, should have been overruled and the injunction continued, or modified according to the sound discretion of the Court below, so as to protect the rights of the complainant.

Let the judgment of the Court below be reversed.

JAMES W. ARMSTRONG, plaintiff in error, vs. C. W. HAND and D. BAGLEY, defendants in error.

When a cause was tried before a *petit* jury, and a verdict rendered, one of the defendants, on the 13th day of April, 1866, presented his bill of exceptions to the presiding Judge, who signed and certified the same on that day; on the 17th day of the same month, before the bill of exceptions was filed in the clerk's office, the defendant entered an appeal from the verdict of said *petit* jury according to law, and on the 19th of said month filed his bill of exceptions in said clerk's office, whereby the cause was heard and decided in the Supreme Court upon said bill of exceptions (the counsel of the defendant in error having knowledge that an appeal had been entered from the verdict in the Court below): *Held*, that this Court had no jurisdiction to hear and decide the cause upon said bill of exceptions, when the cause was pending in the Court below on the appeal, and that the Court below erred in dismissing said appeal, the same having been legally entered.

Motion to dismiss appeal. Decided by Judge VASON.  
Sumter Superior Court, April Term, 1867.

Plaintiff in error sued said Hand & Bagley as makers, and one Lewis as endorser, of a promissory note. At April Term, 1866, there was a verdict against the makers, and judgment thereon, from which, within four days from the adjournment of the Court, to-wit, on the 17th April, 1866, they entered an appeal according to law.

Before this—to-wit, on 13th April, 1866—the said defendants' attorneys had presented to the Judge a bill of exceptions in said case, which he had on that day signed and certified according to law. The bill of exceptions was not filed in the clerk's office till the 19th day of April, 1866. No bond or affidavit was filed to operate as a *supersedeas* in the case.

The clerk sent up a transcript of the record (omitting the appeal,) to the June Term, 1866, of the Supreme Court, and the case was then and there heard and the judgment of the Court below affirmed. The *remittitur* was subsequently entered upon the minutes of the Superior Court, and the judgment of the Supreme Court made the judgment of the Superior Court.

Upon that state of facts, attorneys for plaintiff in the

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Court below moved to dismiss the appeal, and the Court ordered it dismissed.

This order of the Court is assigned as error.

(In the argument in the Supreme Court, it was stated by attorneys for plaintiff in error that the said writ of error was sued out to settle a question in the Court below, which did not touch the merits of the case except upon one point, and that was whether the condition of a bond warranting persons "to be slaves for life" was broken by the emancipation of the slaves by this State, and that it was known to attorneys for defendant in error, when that case was being argued here, that said appeal had been taken and was pending, and that they made no motion to dismiss the writ of error on that ground: all of which was conceded by attorneys for defendants in error.

HAWKINS & MCKAY, for plaintiffs in error.

COBB & JACKSON, for defendant in error.

WARNER, C. J.

The error assigned to the judgment of the Court below is in dismissing the appeal entered in accordance with the statute. It appears from the record that the cause was tried in the Court below before a *petit* jury; that on the 13th April, 1866, a bill of exceptions to the ruling of the Court upon that trial was tendered to and signed by the presiding Judge, but not filed in the clerk's office at that time; that on the 17th day of April, 1866, before the bill of exceptions had been filed in the clerk's office, Hand, one of the defendants in the Court below, entered his appeal from the verdict of the *petit* jury, within the time required by law, giving the proper bond and security; that on the 19th day of April, 1866, the bill of exceptions, certified as aforesaid, was filed in the clerk's office, but no bond was given or affidavit filed to operate as a *supersedeas*, as provided by the 4171 section of the Code. The Clerk of the Superior Court sent up to this Court the transcript of the record, except that portion of

it which showed that an appeal had been entered in the Court below. The cause was heard in this Court upon that record, without objection, though the counsel for defendant in error knew that an appeal had been regularly entered from the verdict, in the Court below. This Court affirmed the judgment of the Court below upon the trial before the *petit* jury, which, upon the *remittitur* being returned, was made the judgment of that Court. Was it error in the Court below in dismissing the appeal upon this state of facts? The decision of this question will depend upon the fact whether this Court had jurisdiction to hear and determine the questions involved in the cause by writ of error, when an appeal was pending in the Court below between the same parties. The plaintiff in error was entitled to enter his appeal from the verdict of the *petit* jury in the Court below, within four days, as a *matter of right*, which was done, §3529 Code. When does this Court acquire jurisdiction to hear and determine the alleged errors to the judgments of the Courts below by writ of error? By the 4159th section of the Code, it is declared that, "No case shall be carried to the Supreme Court upon any bill of exceptions *so long as the same is pending in the Court below*, unless the decision complained of, if it had been rendered as claimed by the plaintiff in error would have been a final disposition of the cause." The party may file his exceptions to the decisions of the Court, and the same may be entered of record to abide the final termination of the suit, as provided by this section of the Code. But so long as the cause is *pending in the Court below*, it cannot be brought to this Court "*upon any bill of exceptions*." At the time this cause was brought to this Court upon the bill of exceptions, and heard and decided therein, it was pending on the appeal in the Court below. In *Carter and Wife vs. Buchannan*, (2d Kelly, 337,) this identical question was decided. In that case, it is said "the judgment of this Court would be *brutum fulmen*, or it would operate as an instruction to the Court upon the trial of the appeal." See *Jones et al. vs. Crawford*, 18th Ga. Rep., 281.

But it is said that in this case the appeal was entered after



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the bill of exceptions was signed and certified by the presiding Judge, and therefore this Court had acquired jurisdiction of the cause before the appeal was entered. When does this Court acquire jurisdiction of a cause when there has been a final disposition of it in the Court below? Does it acquire jurisdiction when the Judge certifies the bill of exceptions tendered to him by the party? We think not, for the party may never file it in the clerk's office, may conclude to adopt another remedy, as was done in this case. When there has been a final decision of the cause in the Court below, the bill of exceptions thereto duly signed and certified by the presiding Judge, and *filed* in the clerk's office as required by the 4170th section of the Code, and there has been a compliance with the requirements of the 4171st section of the Code, then this Court acquires jurisdiction of the cause to hear and determine the errors complained of in the Court below.

The appeal was legally entered, the party had the legal right to enter it at the time it was entered, but he did not have the legal right thereafter to bring his case up to this Court by his bill of exceptions, which fact we suppose was well known to the counsel of both parties. If the clerk had sent up the entire record to this Court, including the appeal, as it was his duty to have done, then this Court could have protected itself from the *unauthorized* experiment that was made upon it.

We cannot forbear to express in the strongest terms our unqualified disapprobation of the conduct of the counsel of the parties in this case, in obtaining from this Court its judgment while the cause was pending in the Court below, in this illegitimate and illegal manner, as disclosed by the record. It might not be entirely safe to renew the experiment hereafter, and we sincerely hope that it will not again be attempted.

Let the judgment of the Court below be reversed.

ANDREW ROBIN, plaintiff in error, vs. NOBLES and MITCHEL,  
defendants in error.

NOTE.—WARNER, C. J., did not preside in this case.

*Certiorari* from a decision of a County-Judge, must be sued out within ten days from the decision, and not afterwards, that being the time prescribed therefor in the act organizing the County-Courts. The decisions of possessory-warrants form no exception to this rule.

Motion to dismiss *certiorari*. Decided by Judge UNDERWOOD, Floyd Superior Court, Adjourned Term, April, 1867.

Robin sued out a possessory-warrant against Nobles & Mitchel to get possession of a steam engine. It was tried before D. W. HOOD, County-Judge, on the 29th of September, 1866. He ordered that plaintiff pay the costs, and that the engine be delivered to the defendants upon their giving bond as required by law.

To this decision Robin excepted, and sued out his *certiorari* on the 10th of November, 1866.

Upon motion of attorneys for Nobles & Mitchel, the Judge of the Superior Court dismissed the *certiorari*, because it was sued out more than ten days after the decision of the County-Judge. This ruling is brought up for review.

WRIGHT and BROYLES, attorneys for plaintiff in error,

Contended that the 31st section of the County-Court Act did not cover *certiorari* from decisions in possessory-warrants; that sections 3960 to 3967, inclusive, was the law applicable to such cases; that said 31st section is not applicable to decisions made at Chambers. R. M. Charlton's R., 547; Livingston vs. Livingston, 24th Geo. R., 379; 34th Geo. R., 91; Taylor vs. Gay, 20th Geo. R., 77. And if wrong in those positions, still *certiorari* might be sued out otherwise than in accordance with said 31st section. R. M. Charlton's R., 543; 2 Chit. Gen. Prac., 219, 374, 375; 27th Geo. R., 67; 23d Geo., 360; 22d Geo., 95; Sedgwick on Stat. and Cons. Law, 39, 40, 93, 402; Bac. Abr. *Certiorari* (D); 2 Bou. Dic., 461.

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Durrett *et al.* vs. Rucker and Haslett, ex'rs, &c.

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D. S. PRINTUP, for defendant in error.

HARRIS, J.

There seems to be some discrepancy in the several acts of the Legislature touching the issue and service of *certiorari*. Uniformity would probably have been better, but that is matter of Legislative will. We have no power to disregard a plain provision of law, definite and unambiguous, and furnishing no opening for construction, so as to reconcile apparently contradictory provisions. It is enough to say that when a *certiorari* is sued out on the decision of the right of possession under a possessory-warrant by a County-Judge, it must be sued out *within* the time prescribed by the act creating the County-Courts, *and not otherwise*; that by failure to conform to those acts the party here has lost the benefit which the law allowed him upon compliance with its provisions.

Judgment affirmed.

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RICHARD D. DURRETT *et al.*, plaintiffs in error, vs. ELBERT M. RUCKER and WILLIAM M. HASLETT, executors of JOSEPH RUCKER, deceased, defendants in error.

NOTE.—WARNER, C. J., did not preside in this case.

(Only two Judges presiding and they differing in opinion, nothing is decided in this case by the Supreme Court. The judgment below is affirmed by force of the statute.)

Bill for direction. Decided by Judge WILLIAM M. REESE. Elbert Superior Court. March Term, 1867.

Joseph Rucker executed his last will and testament on the 12th of March, 1861.

The 8th and 9th items of it were as follows:

“Eighthly.—I give, bequeath and devise to the children

of my daughters, Martha Durrett and Catharine White, twenty-five hundred dollars in money, and twenty-five negroes of an average value of those remaining or not otherwise disposed of, to be equally divided among them all,—that is, all of the children of my daughters, Martha Durrett and Catharine White, in fee simple.

“Ninthly,—I give, bequeath and devise to the children of my daughters, Martha Durrett and Catharine White, one-seventh part of the remainder of my negroes not otherwise disposed of, at an average value, to be divided among them share and share alike;—that is, the children of my daughters, Martha Durrett and Catharine White, in fee simple forever.”

In 1864, Joseph Rucker died. Said will was proven in common form in September, 1864, and in solemn form in March, 1865. Elbert M. Rucker and William M. Haslett were qualified as his executors in September, 1864.

Martha Durrett and Catharine White died before the will was made. At that time, there were living two children of Martha Durrett, to-wit: Thomas J. R. Durrett of Hart County, (who died in Hart County, Georgia, in August, 1864, a few weeks before the death of said testator,) and Frances M. Harper, wife of William J. Harper, of said Elbert County. Thomas J. R. Durrett, deceased, left three children, to-wit: Richard D. Durrett, Agnes Durrett and Thomas Durrett, all minors, still residing with their mother in Mississippi.

When the will was made, there were living two children of Catharine White, to-wit: Margaret Ruffin, wife of Thomas Ruffin of Mississippi, and Sarah F. Ruffin, who died in 1864, before the death of said testator,—she leaving three children, to-wit: David W. Ruffin, Rosa M. Ruffin and Kate Ruffin, all minors, residing, (when the bill was filed,) in Mississippi.

For William J. Harper and Frances, his wife, and Thomas Ruffin and his wife Margaret, it is claimed that said legacy to the children of Martha Durrett and Catharine White, belongs exclusively to them, as the only persons living at the death of the testator, who answered the description of “the children of Martha Durrett and Catharine White.”

For the said minor children of Thomas J. R. Durrett, and

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the said minor children of Sarah S. Ruffin, it is claimed that they are entitled to the shares of said legacy which their said parents, if living at testator's death, would have respectively taken.

Emancipation having disposed of the negroes as property, the fight is over the money legacy only.

The prayer of the bill filed by said executors, is that they be directed how to pay out said fund.

Guardians *ad litem* for the minors were appointed. All the claimants answered the bill, admitting the statements aforesaid, and setting up their respective claims as aforesaid.

By consent all the questions of law and fact were submitted to the Judge for decision, and it was understood that he would file his written decision, and either party might except within thirty days thereafter.

The decision of Judge Reese, after stating the facts, is as follows:

The controversy between grandchildren and great-grandchildren, has given rise to the bill filed by the executors for direction.

The grandchildren, called in the will the children of his daughters, (M. D. and C. W.,) insist that the legacy of \$2,500 is given to a class, and under the law, passes to the survivors of that class. The great-grandchildren insist that the legacy is given to individuals, sufficiently described to be ascertained, and under the law of lapsed legacies, descends to them.

According to Mr. Jarmin, v. 2, p. 69 b, the legal construction of the word "children," accords with the popular meaning, and refers to immediate offspring; and the same author, in page 74 of 2 vol., says, an immediate gift to children, that is, a gift to take effect or possession immediately on the decease of testator, whether the gift be to children of living or deceased persons, whether "to children" simply, or "to all the children," and whether there be a gift over, in case of the decease of any of the children under age, or not comprehending children living at testator's death only. This author says the words "the children" and "all the children," mean the

same—one is no clearer than the other. To sustain his position, the author cites 1 Brown C. C. Rep., p. 542; 5 Madd., 332, which sustain him fully.

In 25 Ga., p. 559, Judge McDonald says, "the negroes are all passed by the second item of the will absolutely, except seven—they passed to the children of testator. Grandchildren cannot take by the descriptive word 'children,' unless there is something in the will to manifest that intention. Nothing could pass to Philip Walker, for he is not named, and at the death of testator, he was dead. He was not a child." On p. 356, the Judge (McDonald) says, "According to the interpretation we put on the will, Walker could take no interest under the 2d item of the will. The children who are beneficiaries under that class, are not named. The negroes are given to the children as a class, at the death of testator."

In v. 1, p. 295, Jarmin says, "when the devise embraces a fluctuating class of persons, who by the rules of construction, are to be ascertained at the testator's death, the decease of any such person during the testator's lifetime, will occasion no lapse, even though the legatees are made tenants-in-common, since members of the class antecedently dying, are not actual objects of the gift. Then if the property be given simply to the children, equally to be divided between them, the entire subject of gift will vest in any one child or a larger number of them surviving the testator, without regard to previous deaths." The author cites 13 East, p. 526, to sustain this proposition.

In this case from East, a contest arose over the following words of a will: "I give unto the children of Mary S., £50 to be equally divided amongst them, share and share alike, and to the children of R. M. £20, to be equally divided amongst them, share and share alike." Lord Ellenborough, Chief Justice, says in relation to this will, then, "Looking at the will before us, I have little doubt in saying that the testator intended to devise his estate to the several objects of his bounty in classes, taking the chances of there being a greater or less number of persons in each class, and meaning if there was more than one individual of the

same description, they should all take equal shares,—if only one, that one should take the whole given to that class." Lord Ellenborough refers in this case to 2 Vernon, Crook *vs.* Brooking, as an authority.

Jarmin on the subject of Lapse further says, v. 1, p. 295, "And the rule is the same when the gift is to the children of a person actually dead at the date of the will, in which case it is to be observed, that the class is susceptible of fluctuation only by diminution." He cites as authority, 2 Brown, C. C., 658, (v.) a. The case referred to in 2 Brown is as follows: "Master of the Rolls,—there is no doubt in this case as to the bequest to the children of S. W., for all S. W.'s children were alive at testator's death." It was once thought that a bequest to the children of A., might extend to all the children born at any future time; but it is now settled in favor of such children as are born at the time the distribution of the fund was to take place,—the doubt in this case arising on the clause which gives, "to the children of my late sister M. C., £2,000 to be equally divided between them."

As I said before, the general rule is, that the children living at the time of the distribution of the fund, shall take. It is to be distributed at testator's death; such children as are then alive, shall take. If it is to be distributed at the death of some other person, then the testator should be supposed to mean such children as are then living. Then the question is, whether a gift to the children of his late sister C., is or is not indicative of an intention different from what would be imputed to him under this general rule; namely, that he meant the particular children living at the time he made his will, to take the fund equally between them, and that it was the same thing as if he had given "the £2,000 to the three children of my late sister," for in that case it would have been a legacy to these designated persons. Now when a testator gives a fund to be divided amongst his own children, he shall be supposed to mean such children as shall be living at the time of his death; if so, why should I suppose that the sister being dead, he meant to do anything else than what would be imputed to him in the other case? This is not like the case

of *Bender vs. Suffolk*, 1 P. Wms. 96, for there the gift is to the five children, "which shows that he had particular objects in view. The general rule, I take it, is to exclude all children who, though living at the time of execution of the will, yet die before the testator, and to include those who are living at the time of distribution, though born after the will or the death of the testator." Such is the case from 2d Brown, and one similar to the case now before me.

It is true that the case of *Martin vs. Wilson*, 3 Brown, C. C., 325, is opposed to the one just cited; but Jarmin and Roper both condemn it, say it would not be followed, and was made in ignorance of the case in 2 Brown, C. C. The only other case remaining to be noticed, is that in 30 Ga., 977, where the question was, whether certain words made a gift to a class or to individuals—the words being, "The estate to be divided between my two sisters' children, E. J. and M. L., viz, (naming the children); and the facts in addition were, that one of the named children died before the testator and unknown to him. Judge Stephens delivered the opinion of the Court thus: "Did the testator intend to give the estate to certain persons named, and who were children of his two sisters, or did he intend to give it to a class described as children of his two sisters, including all who fell within this class and none who did not—the names only being mentioned as a supposed correct enumeration of the individuals who composed the class?" To this question the Judge says: "Though children were named, class was the leading idea. Blood was the probable motive of the gift, and we think the gift should go to all who were children of the two sisters and none others—to all who, at the death of testator, answered the description,—that being the time when the will was to speak."

Counsel for the great-grandchildren of Mr. Rucker, urge in reply to this case, that while this is a true rule of construction when the contest is between surviving children or grandchildren and residuary legatees or heirs at law, it should be varied when the contest is between surviving children and grandchildren or the issue of children,—that it should be



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held in such cases the word "children" means not a class, but particular persons. I think it is impossible, consistently with reason, to maintain that the words of a testator may mean differently according to the particular form of the controversy before the Court;—that the will should be construed to meet all the accidents of life;—that if certain events happen, it shall be construed to mean a class, and if certain other events happen, particular persons.

To show further that the words of this testator must be construed according to the usual rule, I will notice some very important omissions. The testator, Rucker, names no child or childre—a remarkable omission of a grandfather familiar with his descendants, desiring to give to particular persons and not a class. Then there are no words of reference to existing children, no allusion to their number, no words of identification. The money given is not divided into two equal parts between the children of Mrs. D. and Mrs. W., thus showing an intention not to give one grandchild more than another, no matter from what stock he may issue. The legacy given is not divided into parts corresponding with the actual number of children when the will was made. I am therefore of the opinion, that the claim of the grandchildren, the surviving children of Mrs. D. and Mrs. W., is the best, and do order the \$2,500 to be equally divided amongst the children of Mrs. Durrett and Mrs. White alive at the testator's death, and no others; and I further order and direct the costs of this proceeding and fee of complainant's counsel, be paid from the residuary legacy of testator, as this is the proper fund to charge these items of expense upon, according to the decision in 14 Ga., 416.

Edmund B. Tate, Jr., *prochein ami* for Richard D. Durrett, Agnes Durrett and Thomas Durrett, and for David M. Ruffin, Rosa M. Ruffin and Kate Ruffin, excepts to the decision, claiming that the Durrett and Ruffins respectively are entitled to one-fourth of said legacy.

The executors except to that part of the decision which

charges the residuary legacies with costs, etc., they contending that the \$2,500 should be charged therewith.

ROBERT HESTER for the minors, }  
A. T. AKERMAN for the executors, } for plaintiffs in error.

E. P. EDWARDS, for William J. Harper *et uxor*, defendants in error.

Judge WALKER adopts the opinion of Judge REESE.

HARRIS, J.

At present this Court consists of only two Judges. Under the act organizing it, the concurrence of one of the Judges presiding, will affirm the decision below. Judge Walker concurs with the circuit Judge, and that disposes of the case. I withhold my assent. I am strongly inclined to doubt whether the rule of construction followed by Judge Reese in this case, and upon the correctness of which all the adjudicated cases cited by him depend, is in accordance with the fundamental rule of interpretation of wills,—the intention of the testator. I cannot bring myself to think otherwise than that a testator, when he gives a moneyed legacy to the children of a deceased daughter, he means those living at the time of *making his will*, and not those of them living at the time of his death. If the Courts would adopt the period of the *making* of the will as the point of time for the ascertainment of who were *intended* to be the devisees, it occurs to me that many difficulties would thereby be avoided, which must continue to embarrass decision otherwise;—and they would give effect almost universally to the intent of testators. It would also give effect to that clause of our Code which declares that legacies without remainder or limitation shall not lapse, but shall vest in the issue in the same proportions as if inherited directly from their ancestor.

I desire the question open, hence this dissent.

SAMUEL PALFUS, plaintiff in error, vs. THE STATE, defendant in error.

1. Where there is no evidence to sustain a verdict, the same will be set aside.
2. To constitute a house a disorderly house in law, the noises, &c., must be *ordinary and usual, or common*, and the disturbance must be *general*, and not of only *one* person in a thickly settled neighborhood.
3. When the jury mistake the *character* of the case or of the evidence, and the *amount and kind* of testimony, it is good ground for a new trial.

*Certiorari* from County-Court. Decided by Judge VASON, Dougherty Superior Court, January Adjourned Term, 1867.

In the County-Court of said county, in July, 1866, Palfus was tried on an indictment for keeping and maintaining a common ill-governed and disorderly house.

The testimony introduced was as follows:

JAMES H. HILL testified that about four weeks before, at 11 or 12 o'clock at night, there was loud noise upon the steps and in the house of defendant; he went there to stop it; negroes were cursing upon the steps; witness saw two negroes with their heads poked out of the second door (from the street) of defendant's house; witness had frequently heard loud cursing and swearing up stairs in defendant's rooms; witness lives on the lot adjoining the one on which defendant's house is situated, about forty or fifty feet from the door of the lower room of defendant's house; witness' house is on the south side of defendant's, on Washington Street; the stairs are on the north side of defendant's house, between it and the brick building occupied by Fields & Jelks; the doors of the rooms of defendant up-stairs, lead out upon a platform on the north side, at the head of the stairs; the stairs go entirely over into the back yard of defendant's premises.

Henry Morgan, Esq., has occupied the front room up-stairs as an office, and slept there. Witness has been disturbed by noise in said house a number of times before the time spoken of, and he had complained to said Morgan about

it, who he thought could stop it; on the night spoken of, witness went there twice to stop the noise.

R. H. ALLEY testified that he had slept in his grocery, next door north of Fields & Jelks' store; had never heard any noise at defendant's house, except a little running over the stairs, but the noise never disturbed him.

\_\_\_\_\_ testified that he occupied the brick store immediately north of defendant's house; was only there in the day time, but never heard any noise there.

THOMAS JOINER testified that he sleeps up-stairs in the brick building occupied by Fields & Jelks; that he had never heard any noise at defendant's house, except at the time first spoken of by Hill (*ante*); then he heard some noise, and negroes running over the stairs; witness had just moved into the house, two or three days before.

G. W. TERRY testified that two or three months before the trial, he heard fiddling and dancing in defendant's house; about that time he frequently heard fiddling there, and several times loud talking and cursing; witness boards at Mr. Hill's, and was on his front piazza when he heard these noises; he asked Hill why he did not stop it; some ladies were with witness in the piazza, and the noises and cursing disturbed him and the ladies.

Here the State closed. Defendant introduced the following testimony:

J. E. ROMNEY testified that he lives in the Shackelford lot, adjoining defendant's lot; witness is a tailor, and works for defendant, who is also a tailor, and witness is at defendant's house constantly every day.

Defendant's negro family was an old woman and her three daughters, she and one daughter being seamstresses, who sew for defendant. There never was any noise at defendant's while the witness was about. Witness is a little deaf, but has never heard his family complain. There was a good deal of running over the steps from the back yard both night and day.

F. POLACHEK testified that he had been engaged as clerk in the store immediately under the rooms occupied by de-

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fendant up-stairs, and sleeps in the store every night. . . He never knew any disturbance there.

WILEY BRASWELL testified that he clerked for defendant from 1st January till the latter part of March, and sometimes played the fiddle up-stairs, and sometimes down in the storeroom, but there was no other noise or disturbance there while he stayed there.

D. NEWMAN testified that he clerked in the store immediately under defendant's rooms from the middle of April up to the trial, and stayed there night and day. Michael Sullivan, who lived with defendant, came there one night drunk, and made considerable fuss, but with that exception there had been no noise there to disturb any one.

Wm. RICH testified that he had stayed in the store immediately under defendant's room daily, and slept there at night constantly from the 1st February until the 24th April, and during that time there was no noise there to disturb any one; there was considerable passing over the steps to the back yard, and once at a wedding they had fiddling and dancing, as was usual on such occasions.

HENRY MORGAN testified that he had for several years occupied the front room up-stairs of defendant's house as an office and sleeping room, and was separated from the room occupied by defendant's negroes by a thin partition only; the room in the west end is defendant's kitchen, and the negroes usually stay in the room next to witness' office.

Witness was confined to his room by sickness from about the first of January till about the first of May, and was sometimes extremely nervous, and noise would have disturbed him certainly; he was not disturbed; there was a wedding there one night, and fiddling and dancing as usual on such occasions; there was frequent passing over the stair-steps into the back yard, and this had disturbed him when he was sick, there being only a wall between his room and this stairway; It is under witness' control; defendant only has a right to pass over it to get to his rooms in the rear; witness had not slept in his office since 2d May last.

During the trial, defendant sought to prove that the house

of Hill; the witness, was a disorderly one, but the Court refused to allow it. The Judge was requested to charge the jury that "in order to convict in this case, the person charged must keep and maintain a common disorderly and ill-governed house; that 'keep and maintain' means he was in the habit of doing it daily, weekly, and monthly; that it must be a common thing, and to the common disturbance of the neighborhood; that is, that it disturbed everybody;" and that unless every allegation in the bill was sustained by evidence, the jury must acquit.

The Court did not charge as requested, but charged the jury that if they believed the house had been kept in a disorderly manner, they must find the defendant guilty; giving no explanation of what "disorderly" in the statute meant.

The jury found the defendant guilty, and the sentence was, that defendant pay a fine of one hundred dollars and the costs; or, in default of payment, be imprisoned for six months in jail.

Defendant sued out *certiorari* on the points indicated heretofore, and upon the ground that the verdict was contrary to law, the charge of the Court, and the evidence.

Upon the hearing, Judge VASON refused a new trial, and this refusal is assigned as error.

H. MORGAN, for plaintiff in error.

D. H. POPE, Solicitor General, for the State.

HARRIS, J.

1. A new trial should have been awarded by the Superior Court. Carefully analysing the testimony to ascertain its probative force, we think that it is very far from establishing the fact alleged, that defendant "did keep and maintain a common ill-governed and disorderly house, to the encouragement of idleness, gaming, drinking, or other misbehavior, or to the common disturbance of the neighborhood or orderly citizens." There is not a particle of testimony which classes the house of defendant as an inn, a gaming house, or drink-

ing saloon, or ten-pin alley, or as a house or place where the idle or dissipated, or riotous and lawless collect or frequent; nor does it appear to be a place or house kept for any purpose injurious to health or morals. A part of the house was occupied by defendant with his tailoring business (he being a tailor by occupation), a room or two by negro women, some of whom were employed by him as seamstresses, another room up-stairs was occupied as a law office and sleeping room by Henry Morgan, Esq., and underneath the rooms of defendant was a store room where business was regularly transacted. These facts considered make the charge of keeping a common ill-governed and disorderly house difficult to prove. It certainly in this case could be maintained only by clear proof of the cursing and swearing, and loud and frequent noise, to have been in the rooms of defendant under his control; and then that they were *common* and *usual*, and were to the *common* or general disturbance of the neighborhood or orderly citizens.

Does the testimony establish either the one or the other? Can the cursing and swearing and noise on two, three, or four occasions complete and fill the idea of the law as expressed by the word *common*? What noises are proven specifically but the fiddling of a clerk several times in the rooms of defendant, and that of negroes going over the stairway, which was under the control of Mr. Morgan, not of defendant? And this is the substance of the testimony upon which defendant was convicted.

2. We apprehend that the Legislature in enacting this clause of the Code for the preservation of order and tranquility, designed to act upon criminally—only such houses wherein loud noises, cursing, swearing, &c., were *ordinary* and *usual*, or *common* occurrences; not casual and at long intervals, but were the general, customary, common habits (if we use such an expression for illustration) of the house. These characteristics seem to us essential to fix upon a disorderly house the name of *common*.

So, too, the noise or disorder must not disturb *one* person only in a thick or populous neighborhood; it must disturb it

*generally*, or it cannot be said of it to have been to the *common* disturbance of the neighborhood or orderly citizens. The testimony here shows but *one* person living in the immediate neighborhood to have been disturbed, whilst several witnesses occupying the same house with defendant, and others an adjacent house, being there the whole time deny that there was at any time in defendant's house such noise and disorder as was charged.

3. The finding of the jury in the County-Court, we presume, must have been the result of a misconception of the *kind* of house the Legislature meant to regulate, as also of the *amount* and *kind* of testimony necessary to constitute the offence. It may be that the jury did not give due weight to the testimony on the part of defendant, from the impression, probably, that it was altogether negative in its character. It appears to us to be distinctly affirmative of the facts testified to, of the rooms of defendant being quiet and orderly during the time spoken of, and thus becomes important proof to rebut the idea of usual, general, common disorder in them.

Let the judgment be reversed.



Odom vs. Odom.

JAMES S. ODOM, plaintiff in error, vs. HARRIET ODOM, defendant in error.

1. The declarations of the wife, when in the act of leaving her husband's house and taking certain articles of household furniture with her, made in the presence of his two sons and others, are admissible in evidence for the purpose of showing and explaining her motives and conduct at the time, although her husband was not present.
2. On the trial of a libel for divorce, the ante-nuptial agreement between the parties is admissible in evidence, for the purpose of showing the source from whence the property was derived, as provided in the Code.
3. Where the defendant, shortly before the separation between him and his wife, had transferred his property by deeds of conveyance to his children by a former marriage: *Held*, that the deeds were admissible in evidence, for the purpose of showing, in connection with other evidence, that the transfers of the property were made with a fraudulent intent.
4. Legal cruelty, which will authorize a divorce under the Code, may be defined to be such conduct on the part of the husband as will endanger the life, limb, or health of the wife, or create a reasonable apprehension of bodily hurt, so as to render cohabitation unsafe.
5. Condonation is a conditional forgiveness of all antecedent guilt. After a reconciliation, fresh acts of cruelty will revive acts of cruelty and also of adultery. Condonation is not so readily presumed against the wife, as the husband. Knowledge of the guilt of the husband, and forgiveness by the wife, are not legally to be presumed, but must be clearly and distinctly proved, in order to bar her action.
6. Alimony is an allowance out of the husband's estate, made for the support of the wife when living separately from him. When the verdict of the jury was in favor of a divorce, a *vinculo matrimonii* between the parties, and they further found for the plaintiff the sum of \$12000.00: *Held*, that the legal effect of the verdict, under the Code, is to vest that sum in her as permanent alimony for her support and maintenance during her life only, according to her rank and condition in life.

Divorces. Alimony. Sayings of wife. Tried before Judge COLE. Macon Superior Court, March Term, 1867.

Harriet Caldwell, widow, married James S. Odom, widower, 26th January, 1860. They quarreled, and finally separated 4th October, 1865, and she sued for a divorce, a *vinculo matrimonii*.

The libel charged that he had treated her cruelly, by failing to furnish her proper clothing and the necessities of life,

by threatening to whip and shoot her, and by violently assaulting and beating her, first on the 8th February, 1865, and again (after she had left him and returned,) on the 11th August, 1865; and further, that he had been guilty of adultery with his slave Hester.

The schedule of property filed footed up \$29,266.00, which was made up of a plantation; 808 acres, in Macon county; estimated at \$5,656.00; fifty bales of ginned cotton, estimated at \$7,500.00; thirty-six bales of cotton unginned, estimated at \$4,800.00; growing crop estimated at \$9,000.00, stock, furniture, etc.

A note to the schedule set forth that by the marriage he got with her \$6,000.00 in cash, nine slaves, and the use of thirty-eight or nine slaves in which she had a life estate, that she had nothing but a note on him for \$3,000.00, which she was not certain of collecting, and that she believed he had money due to him of which she could give no specific statement.

Defendant plead not guilty, condonation, and that if he had treated her cruelly her bad conduct provoked him to it, and that she was guilty of like cruelty.

She filed a bill restraining him from disposing of his property *pendente lite*, and at the appearance term procured an order for temporary alimony of fifty dollars, per month, and for fees for her solicitors for the present of three hundred dollars.

The first verdict was obtained during the first week of the Court, and during the second week the case stood for final trial.

The Solicitors for libellant read in evidence the marriage license and certificate, dated 26th January, 1860.

They then read the answers of C. ALICE HAUGABOOK to interrogatories. She testified that she was daughter of libellant; that she, Zebulon Odom and Bunyan Odom were present on the 4th October, 1865, when libellant left defendant's house, but defendant was not present. Libellant then said to the boys that their father had treated her so badly that she could not stay with him any longer, that he had pushed her

out of the door, and ordered her off the place, and took the keys from her.

Defendant's solicitors objected to these sayings of libelant, but they were held to be competent testimony.

She further testified that libelant and defendant lived together unhappily, that it was defendant's fault; that he spoke roughly to libelant, though his words witness did not recollect; that she saw prints of fingers on libelant's arms for two weeks; that defendant would not allow libelant to carry the keys and give out meals; would not allow meat or flour for supper or breakfast, had very coarse fare, and seldom had flour; that he gave plaintiff four calico dresses, about twelve yards of bleached homespun, a part of a bolt of Macon homespun, one handkerchief, three or four pairs of shoes and one Quaker bonnet, that witness knew of since the marriage; that she never knew libelant to have a difficulty with any one but defendant; that defendant once charged libelant with sending a little negro into the field to watch him, and abused her for it.

Upon cross-examination, she stated that she was nineteen years old, not very friendly with defendant, but would not do him injustice; that she was impartial and competent to judge, and thought defendant was blameable; that when her mother left she took off five chairs, two bedsteads, two feather-beds, two mattresses and pillows, some bed covering, though not much, one wash-stand, one wardrobe which was her own, one table, one looking-glass and some dishes; that one of the beds and furniture belonged to the Caldwell children. Defendant was not present; do not know whether he gave his consent. That she had made an affidavit heretofore, but testified without having her memory refreshed, and with no one present besides the commissioners.

They next read the interrogatories of JOSEPHINE A. HAUGABOOK, who said, she was seldom about the house and not long at a time; so far as she knew, libelant did her duty as a wife, and she knew nothing of cruelty by defendant, except that she had seen bruises, like the print of fingers, on libelant's arm; she had never seen but two calico dresses given

libelant by defendant since the marriage, and stated about the same as her sister as to what her mother took away when she left Odom's. She said she was not present when her mother left, but was just before she left, and heard her mother tell Zebulon and Bunyan Odom that she had tried to live with their father and could not do it.

This remark of libelant was objected to, and the objection was overruled.

Upon cross examination, she stated that she was twenty-three years old, not unfriendly to defendant, did not know who was to blame; did not know to whom the things taken away belonged, only they were in defendant's possession; never heard libelant use any insulting language to defendant; defendant was not present when libelant left; libelant gave witness one dress just after the marriage, which she bought before, and witness' husband gave libelant one brilliant dress.

MARY T. SPIVEY (for libelant,) testified by interrogatories that she was present when Mrs. Odom left in October last; that she took away various articles, (enumerating them substantially as aforesaid,) and that Bunyan Odom said to libelant, "Father said you must not take those cane-bottomed chairs, they are the parlor chairs."

This saying was allowed over the objection of defendant's attorneys.

She testified that she was at Odom's a great deal, knew that Odom and wife did not live pleasantly together, but did not think Mrs. Odom was blameable; that she never heard her speak unkindly to Odom or the children, but did her duty as a wife, treating Odom with kindness and affection; never heard her speak unkindly to him or even to the servants. She said she had known Mrs. Odom to go from one house to another to speak to defendant, and he would get up and go away and would not answer her or allow her to speak to him; never heard Odom abuse his wife, but he would not let her carry the keys, nor give out any provisions, nor have anything to do with the cooking; he never had any meat for supper or breakfast nor any flour while witness stayed there,

unless when they had company, then they had good meals. Mrs. Odom had very few clothes; witness knew that she had but one under-body first of 1866—had seen her pull it off Saturday night and have it washed and dried to wear Sunday. Odom never gave his wife a Sunday-bonnet since they married.

Cross-examined, she said that she was fourteen years old in March, 1866; was libellant's grand-daughter; not very friendly with Odom, but would not do him injustice; that she might not be a competent judge, but thought Odom was blameable; that she did not know to whom the things Mrs. Odom took away belonged, nor whether she took them with Odom's consent; Odom was not present when his wife left; that she had never made any affidavit in this case; no one but the commissioners were present while she answered, and that she had consulted with no one about her answers to the interrogatories.

ANNA V. SPIVEY, whose interrogatories had been taken by libellant, swore that she was present when Mrs. Odom left, and that Zebulon and Bunyan Odom were present; that libellant told the boys that she was going to leave there, that she had tried to live there but could not stand the treatment, and she was going to take something, and told Zebulon to make a memorandum of what she took, which he did.

This remark was objected to by defendant's solicitors, but the objection was overruled by the Court.

She enumerated the articles taken away in substance as did the other witnesses.

She swore that she was not about there much, but thought Odom and his wife did not live together happily, don't know why, but thought Odom was to blame; had seen Mrs. Odom speak to him and he would not answer her; had seen him help all the plates at table and not wait on his wife; he would not allow her the rights and privileges of a wife; would not allow her to carry the keys to the meat-house or store-room; had seen Odom with the keys go to get out dinner; in early part of 1865 she saw bruises on Mrs. Odom's arm that looked like fresh prints of fingers—those bruises

staid on her a month or more. Defendant never bought his wife clothing suitable to her station in life; he never purchased but four calico dresses and one handkerchief for her that witness knew.

Cross-examined, she said she was thirty-two years old, daughter of libellant; would not wrong defendant by word or deed, but owing to existing circumstances does not feel very kindly towards him; she thought all the things taken away by Mrs. Odom were purchased by Odom at Caldwell's sale, except the wardrobe—witness and her sister Mrs. Davis gave that to Mrs. Odom. Defendant did not give his consent to the taking off anything. She thought she had given the matter an impartial investigation, and thought Odom was to blame; she did not think Mrs. Odom was to blame at all; never heard her use any opprobrious or insulting language to Odom. All she recollected of what Odom gave Mrs. Odom was one calico dress, one pair of shoes, one or two handkerchiefs, and a pair of gloves. Mrs. Odom gave witness two yards of calico to make her babe a dress, and that is all witness recollects of her giving to witness. She stated that she had never made an affidavit in the case, had consulted with no one as to her answers, and that none but the commissioners were present when she answered.

SARAH K. KNIGHT's interrogatories were next read. She testified that she had known Mrs. Odom twenty-five years, perhaps longer, and lives about three-quarters of a mile from her. Mrs. Odom sent for witness to go to her house (either before or since the separation in February, 1865, she did not recollect which). Odom was there; if he and his wife had any conversation then, witness does not recollect it; does not recollect that Mrs. Odom said anything in Odom's presence or hearing in reference to his improper treatment; she then showed witness a bruise on her arm, but witness does not recollect whether Odom was present.

Cross-examined, she said that she lived three-quarters of a mile from Odom's, in Macon county, and had lived there for many years past: that she could not speak with certainty as to Mrs. Odom's character for amiability, gentleness, meek-

ness, submissiveness, etc., that she knew nothing of Mrs. Odom being suspicious or jealous in her nature, but did know that Mrs. Odom bore the character of a kind-hearted, charitable and clever lady in the neighborhood. During witness' acquaintance with Mrs. Odom, never heard of her being concerned in any improper conduct before her marriage with Odom. Witness is not much of a surgeon or much in the habit of examining wounds; did not know what caused the wounds on Mrs. Odom; was not unfriendly to defendant as a neighbor, and knew nothing more in his favor.

The interrogatories of ADELINE ODOM, a person of color, were offered in evidence, and objected to, on the ground stated in the motion for new trial. The Court overruled the objection, and the interrogatories were read as follows: That she knew the parties; they did not live happily together; that some time last year (1865,) Mrs. Odom went to Macon after Louisa, a house-girl, and when she came back she sent a little girl to Odom for the keys, and he would not send them to her. Odom came to the house; Mrs. Odom asked him for the keys to get a broom. Odom said, you shall not have the keys any more, "you old devil." Mrs. Odom then went out to the little house, out in the yard, to get a broom; Odom went ahead of her, picked up an old axe, and said, "You infernal old devil, I'll have the Yankees to drag you out of my yard directly." Mrs. Odom went back to the house; she saw Odom push Mrs. Odom about several times in the house; if Odom was sitting at the table eating, and Mrs. Odom would come and sit down, Odom would get up and leave. Witness had frequently heard them quarreling at night, but don't know what either said; never heard Mrs. Odom use any bad words to Odom; it was last year, about July or August, that Odom carried the keys, or when he did not, his children did. Odom said Mrs. Odom should not carry the keys any more, witness don't know why; none of the cloth bought was put under Mrs. Odom's control, it was locked up and she was not allowed any of it; he had plenty of wheat and flour, but did not allow his wife to use it.

Witness was the washerwoman, and was called into the

house one morning last year (1865), to get the clothes to wash, and Mrs. Odom's clothes were all wet with chamber-lye and besmeared with the dirt of a little child—this was on her gown, night-cap and under-clothes—don't know when it was, but it was a cold, frosty morning. Mrs. Odom is a good woman ; witness was raised with her.

Cross-examined, she said: I am black, live with Mrs. Odom, have lived with her for some time past. No one ever talked with me about my testimony in this case. I gave my affidavit before in this case ; they called on me to do it. I then said about the same things I have now said—I think it was Mr. Snead and a tall man with him who called on me for the affidavit—I have not heard it read, nor has any one talked with me about it since. I then said about the same thing as now ; and about flour and cloth she refers to her answers to direct interrogatories ; no one told me to say anything about flour or cloth since. I can't read or write ; to tell the truth is what I understand I am now to do. I never heard Mrs. Odom quarrel with or abuse Odom ; don't know her age, but thinks she is sixty or seventy ; no one present but the commissioners.

ROSE HAUGABOOK (colored,) was objected to, as in the last case, but the objection having been overruled, she testified by interrogatories that she knew the parties, and that they did not live happy or agreeable after they moved from Dawson ; not able to tell why ; witness has seen Odom maltreat his wife—saw him push her one time—don't know what he said. Witness went into Mrs. Odom's room early one morning last fall, 1865, she was sitting on the chair crying, her cap and gown were all wet with urine ; the night-glass was setting in the floor empty ; witness helped her to strip. Witness said Odom pushed Mrs. Odom out of doors once ; heard them quarrel, but don't know who started the quarrel ; don't know what they said in their quarrels, as she always left when she heard them quarrel ; they did not eat together as man and wife for several months before they parted ; don't know why. This was last year, (1865). Odom carried the keys ; don't know why Mrs. Odom did not ; Mrs. Odom did not have



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control of any of the cloth bought or made after their first falling out; she did not get any of the cloth for her own use, as witness knows of. Odom had plenty of flour and meat on the place: before he got mad, he let his wife have plenty of it, afterwards he did not. Witness stated that she had belonged to Mrs. Odom since she was twelve years old.

Cross-examined, she said: I am black; live at John Haugabook's; no one has talked with me about my evidence; have sworn in the case before; I then swore about what I now swear, so far as I remember. I think I said something about the cloth and flour then, if I did not it was because I was not asked about it. I cannot read or write; my affidavit has not been read to me, nor has any one talked with me about it since it was taken. I never heard Mrs. Odom abuse Odom or any of his children any way. I did tell Jackson I was not sworn in this case, and I told him Mr. and Mrs. Odom did not eat together; I told Jackson that I said this to the lawyer—I told him so because he told me if I swore against Odom, Odom would get any of these men round here to shoot me for ten dollars. I thought Jackson came to pick me. None present but commissioners.

JAMES CALDWELL testified that, one morning before day, Mrs. Odom and Odom commenced talking in bed; they got up, and Odom threw a bucket of water on her, and then emptied a chamber-pot on her, then threw a pitcher of water on her, and caught her by the arms and threw her down, and that witness afterwards saw bruises on her arms.

At another time, when old Becky was whipped, Odom and Zeb were standing on the steps, Mrs. Odom came up, and Odom shoved her off the steps, and Zeb said, "Pa, I wouldn't do that."

Upon cross-examination, he swore: I am fifteen years old, Mrs. Odom's son. They were talking in bed; neither talked as if angry; I was asleep when the talking commenced; it was before day, and somewhat dark; they had gotten up before any water was poured on Mrs. Odom. She got the chamber-pot from under the bed, and held it to keep Odom from pouring water on her; said if he poured water on her

she would throw it on him. This was before the first separation in February, 1865. After this occurrence she left him, but came back again ; don't know how long she stayed away.

I was present when Odom whipped Becky, but don't recollect what his wife said when she came up ; she was talking. I was not in Montezuma with Berryman Odom the day Becky was whipped. When she went up on the steps Odom pushed her off, and Zeb said, " Father, I wouldn't do that." When he threw her down on the floor and left the print of his fingers on her arm, it was the same morning he poured the water, etc., on her.

#### REBUTTAL.

On the morning when the water, etc., was poured on Mrs. Odom, she did not get up first.

This witness being recalled at defendant's request, swore that he did not, in August, 1865, in the old house at Odom's place tell Berryman and DeKalb Odom that his mother threatened to slap or whip him because he told her she was always quarreling.

ISHMAEL, (colored,) sworn over the objection of defendant, testified that before free he belonged to Mrs. Odom, and after she and Odom married, lived with them. During the marriage (coverture) he saw Odom go into the house of Milly, a mulatto woman, and "have to do with her." Witness was then secreted under the bed, and after Odom got through and went out, he returned and asked Milly if anybody was in there, and she told him that witness was in there, and he then told her to send witness to him, and he made witness go to the well and draw water for him to wash. It was corn-planting time. This was before Mrs. Odom left the first time ; never told her about it till after she left ; never told her till Christmas, 1865.

BEN BRYAN, (colored,) sworn over defendant's objection, said that he knew Hester, a mulatto woman, and that she had a white child ; don't know when it was born, but it was while she lived at Odom's, where she had lived six or seven

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years before. Odom directed witness to send this woman to him one night, which witness did. She went to him, and they went into a vacant room in the old house together. There were some peas in the room. Witness saw them in the room; Odom was in his shirt-sleeves; don't know what passed between them in the room; witness saw nothing; they were in there ten or fifteen minutes, long enough to have done anything they wanted; no light in the room. She was Odom's slave then, and had to obey his call.

Odom came to the field one day, and told witness he wanted Hester to go and dig roots for him; they went off together to dig roots—when Hester returned to the field she had no roots—don't know what he wanted with roots, no one was sick that witness knew of. Hester went twice with Odom to dig roots.

#### CROSS-EXAMINED.

All this happened before the first separation. The old house that Hester went into with Odom was occupied; it was about thick dusk when she went in. Odom frequently came to the field for some one to go with him to dig roots, sometimes other women than Hester would go, and sometimes boys would go; for a considerable distance Odom and Hester were in witness' view when they went after roots, and witness saw nothing amiss.

Witness frequently heard the parties quarreling. Mrs. Odom often watched Odom; followed him one night in her night-clothes to Berryman's house.

#### REBUTTAL.

I live with Berryman Odom; never told Mrs. Odom about these things till after final separation. She asked me about it.

ADAM ODOM, (colored,) sworn over defendant's objection, testified that he knew Hester, she lived with the parties at Dawson, and Odom sent her to his place in Macon county before he moved up here; she had a mulatto child; witness

don't know when it was born, he was in the war at that time; don't know the child's age; don't know that Odom had anything to do with Hester; knows nothing about it; never saw them in a room or house together.

Here Adam refused to answer questions propounded to him, and was committed to jail for contumacy.

LOUISA, (colored,) sworn over defendant's objection, said she lived with Mrs. Odom before freedom; Odom used to come into witness' bed-room and try to have intercourse with her, offered her one time two dollars to feel her titties; on one occasion, at Dawson, to avoid Odom, she went up stairs and carried the children to sleep with her and locked the door; she heard some one come up in the night, and next morning Odom asked her why she did not come in and sleep in bed with him; she nailed up the windows of her house to keep Odom out; he made these offers to her when Mrs. Odom was from home; don't know age of Hester's child; once saw bruises on Mrs. Odom's arm.

Odom got into witness' window one night, and tried to throw her on to the bed; she told him if he did she'd halloo. She blew up the light to keep him off of her, and he would blow it out.

#### CROSS-EXAMINED.

She said she lived in Macon, had come down to see her folks and to testify in this case, and that Odom never had connexion with her.

HENRY KAIGLER, (colored,) sworn over defendant's objection, said he saw Odom push his wife twice off the steps and call em "old she-bitch," and told her if she did not leave the place he would kill her and old Beck too. Mas Zeb say, "Pa, I wouldn't do dat, let em go about her business." It was fodder-pulling time, year before last. Knows that Hester had a mulatto child. Berryman was there. Knows of no one claiming anything on the place before Mrs. Odom left. Made twenty bales of cotton there that year, 1865.

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## CROSS-EXAMINED.

Berryman and Zebulon were both there when Odom pushed Mrs. Odom off the steps.

ALBERT ODOM, (colored,) sworn over defendant's objection, testified that he lived with Odom two years before freedom; that he once saw him shove Mrs. Odom out of the door at Berryman's house to keep her from talking with Berryman; at another time, when witness was beating peaches in 1865, Mrs. Odom went to defendant and asked for the keys to get a broom from a small house in the yard. Defendant refused to give them to her, and she got an axe and threatened to cut the wooden hinges of the door. Odom took the axe from her and shook it over her and threatened to kill her, cursing her for an old she-devil or bitch, and said he would make the Yankees haul her out of the yard. The morning Odom whipped old Becky, he shoved his wife out of doors; Zeb was there, and asked him not to do that.

## RE-EXAMINED.

When he shoved her out of the door about old Becky, Berryman and Zebulon were there, and Miss Odom and her grand-mother and Mr. Odom.

Plaintiff then tendered and read in evidence a receipt from Odom to Abner Burnum, administrator of John J. Haugabook, for \$362.50, dated 5th February, 1861, in full payment and satisfaction of all Odom's claim in Haugabook's estate in right of his said wife, who had been Haugabook's wife.

After proving by the Ordinary that search had been made in his office by counsel, that inquiry had been made of John Davis, administrator of Burnum for the originals and that they could not be found, plaintiff read in evidence two copy receipts, by one of which, dated 14th December, 1861, defendant acknowledged that he had received from Burnum, administrator of James S. Caldwell, nine negroes therein named, valued at \$5,282.00, 256 bushels corn and 500 pounds fodder, valued at \$382.50, being defendant's proportionate share of negro property, and that day divided; and by the

other of said receipts, dated 1st May, 1861, defendant acknowledged the receipt from said Burnum, administrator of said Caldwell, of \$6,168.30, an antenuptial marriage settlement between Harriet Caldwell, James S. Odom and Ichabod Davis, executed 26th January, 1860, whereby the life-estate of said Harriet, in and to forty-two slaves, under the will of her father, George Kaigler, deceased, was conveyed to said Davis, in trust, for the sole and separate use of said Harriet, free from and in no event to be subject to the judgments, debts, contracts or liabilities of or against said James S. Odom, with the further stipulation that if said Harriet should thereafter desire to make any advancements of any of said negroes to any of her children, that she should be allowed to give each of them a negro apiece as they came of age or married: *Provided*, that if any of the negroes given to the children died, she might advance another in lieu thereof, by and with the consent and satisfaction of the said trustee.

Defendant objected to said receipts and to said marriage settlement when offered, upon the grounds stated in the motion for new trial, and the objections were overruled.

JAMES A. SPIVEY testified that Odom got possession of the negroes about one year after the marriage of the parties. Mrs. Odom gave one of them to witness' wife, and another to another of her children, and so far as he knew had not parted with any of the others. Odom had possession of the nine negroes since the division of Caldwell's estate—in all, there were about thirty-five working hands. After deducting all expenses, the negroes were worth for hire in greenbacks, payable now, \$3,500.00 *per annum*.

Defendant owned prior to the separation, and witness supposed at that time, (for up to that period he observed no change in the management of the place,) a plantation in Macon county, containing eight hundred acres, worth fifteen dollars per acre; the horses and mules mentioned in the schedule he thought worth in October, 1865, from \$150.00 to \$175.00 per head, and the carriage about \$350.00. Witness knew nothing of the other articles mentioned in the schedule,

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as he had little to do with Jim Odom since he entered the family.

WARREN W. DAVIS testified that the negroes went into Odom's possession; that he, as trustee of Mrs. Odom, held a note of about \$3,000.00 on Odom, and a note made by Mrs. Odom previous to her marriage for about \$2,500.00 principal and interest, which was paid by Odom in Confederate money, in February, 1865, which money was then seventy for one in gold. In October, 1865, Odom had at home about eighty-five bales of cotton; thinks Odom told witness he had twenty-five or thirty bales more at Eufaula; thinks the land worth about thirteen dollars per acre in October, 1865, and the mules and horses then on the plantation worth \$125.00 per head, farming utensils, household and kitchen furniture, worth \$700.00 or \$800.00, carriage and buggies worth \$500.00, ox-cart \$40.00. The \$6,000.00 receipt given to Burnum was for Mrs. Odom's distributive share in Caldwell's estate. Hester's child was born in early part of 1865, either just before or just after the separation. Witness distilled about forty gallons of peach brandy for Odom, worth \$8.00 per gallon.

CROSS-EXAMINED.

Owing to the unsettled state of the country, the land is not worth now over five dollars per acre; don't think any land now would bring five dollars per acre. In fall of 1865 saw Odom sell a lot of damaged cotton, don't know how much, at eighteen or twenty cents. The price of cotton here since that time has fluctuated from forty-one to eighteen cents—now worth about eighteen cents. The emancipation of the slaves made the crops poor for want of steady and efficient labor; the negroes were free after April, 1865, and Odom had to hire them to make the crop of that year, and this increased the expense of farming; thinks the net profits of the negroes while slaves about \$2,500.00 or \$3,500.00 *per annum*. Odom has five or six children.

## REBUTTAL.

Odom sold about two wagon loads of cotton in October, 1865. The note witness holds as trustee for Mrs. Odom, on Odom, is \$3,084.00, dated 27th February, 1865.

ADAM ODOM, (colored,) brought from the jail and introduced, testified : Odom and Hester were on the bed together twice up here in Macon county and once in Dawson ; it was at night, in the negro-house where Hester lived, and since he married Mrs. Odom ; the time at Dawson, was before witness went to the war, five or six years ago.

## CROSS-EXAMINED.

The first time up here, was just before witness went to the war ; and the last time, after he returned from the war. Witness was after the woman himself, and when Odom came in witness hid under the bed. Odom did not, but Hester did know, that witness was there.

## REBUTTAL.

Never told Mrs. Odom about it until after the second separation, when she sent for him and asked him about these things ; lives with Berryman Odom, at the Odom place.

## EVIDENCE FOR THE DEFENDANT.

B. B. ODOM testified that in 1861, in Terrell county, plaintiff abused defendant about having negroes whipped, and about a month after that she raised another quarrel and had a disturbance with him about whipping Becky (negro). Soon after this witness went to the war, and did not return till 1863 ; then she quarreled with defendant, and abused him, and told him to go and sleep with another old negro woman named Hannah, and accused him of adultery with the negro women on the place. Witness' furlough was out ; he went back to army and did not return home till 1865. Plaintiff, between the first and second separations, abused defendant and accused him of adultery with every negro woman on the



plantation who would allow it: she accused him of adultery with Hester, and abused him about being the father of Hester's child. She always commenced these disturbances, and invariably followed defendant up; she followed defendant to witness' house, went into the house in her night-clothes, and accused witness of having a negro woman there for his father.

Witness was present at the scene about the axe; he had the boy Albert beating peaches; plaintiff came and took an axe, saying she intended to cut down the door and get a broom, and that she would destroy everything on the plantation; defendant took the axe from her, laid it down, then unlocked the door and handed her a broom, which she took and burnt up; defendant did not treat her with the least violence, or threaten her, but asked her to go into the house and behave herself, and let him have some rest.

Was present at the old house when she came there and commenced abusing witness (Berryman) about the business; defendant did not push her out of the door, but took up his hat and walked off; defendant asked her to go away and let them alone; she called witness a puppy, and Odom an old dog; accused him of having intercourse with the negroes, and told the children that Hester's child was their sister; this was in July, 1865. Witness was not present when Becky was whipped in 1865; the day she was said to have been whipped witness and James Caldwell were in Montezuma, and neither of them saw anything of the whipping. James Caldwell said to witness at the old house, in August, 1865, "Mother liked to have got me because I asked her what she quarreled with Mr. Odom so much for."

Odom has six children; don't know whether the youngest son is twenty-one years old; three of these are of age, two daughters under age; at the time of separation, defendant had sheep and cattle down the country (don't know how many), and some sheep up here; had one horse, a note on Zebulon and B. B. Odom for over \$11,000.00, some other notes, one on Way, of Dooly, for about \$160.00, which witness does not consider worth much, a note on Captain Turner,

considered worthless ; Turner says he cannot pay more than ten cents on the dollar.

At the time of separation, all of defendant's property was not worth more than \$12,000.00 or \$13,000.00 ; he was indebted several thousand dollars, and has been compelled to expend about \$2,000.00 in consequence of this case ; has paid \$300.00 to Mrs. Odom's counsel, \$50.00 per month alimony to her since 23d October, 1865, besides \$900.00 for which he has become responsible to his counsel ; defendant lost heavily by the war ; had horses and provisions impressed ; had claims on Confederate Government, together with Confederate bonds and notes ; losses in this way, not less than \$10,000.00.

At the time of separation, there were on the place only fourteen horses and mules, which would not have sold for over \$100.00 apiece on an average ; he had about half a barrel of peach brandy ; the growing Cuba cane belonged to the negroes, and was worth very little ; he had a single ox-cart, worth not over \$20.00, one carriage, worth \$250.00 or \$300.00, one buggy, \$80.00, three negroes, considerably dilapidated, and worth \$150.00, farming utensils and household and kitchen furniture, which witness cannot estimate, about thirty head of cattle, worth \$6.00 per head (for which witness sold them), seven or eight head of sheep, worth from \$1.50 to \$2.00 per head, twenty or twenty-five goats, worth seventy-five cents apiece, ninety or one hundred head of stock hogs, which would average \$3.00 apiece, from sixty-five to seventy bales of cotton, averaging four hundred and fifty pounds ; there were eighteen bales of cotton made on the place in 1865, of which two or three bales were impressed by the Yankees to pay the negroes ; defendant had thirteen hundred bushels of corn above the share of the laborers ; the sorghum syrup mentioned in the schedule belonged to the negroes.

Witness was, but defendant was not present when plaintiff left ; plaintiff said, when she left, that she had a letter from General Warren advising her to leave there ; she carried off an ox-cart and a two-horse wagon load of things when she

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left; defendant had notice of her intention to leave; she commenced moving in the evening and stayed there till dark.

At the time of the separation, the land belonged to Zebulon Odom, and not to defendant; the personal property, except such as was reserved, was turned over to witness and Zebulon Odom, under a sale made to them in September, 1865; It was in July or August, 1865, that plaintiff went to Macon to see about a free negro (Louisa) who had gotten into trouble; during her absence defendant took possession of the keys, and on her return did not give them up to her, because she frequently threatened to destroy everything on the place; in the sale made to witness and Zebulon, the cotton was bought by estimate, because it was only partially ginned and packed; it was estimated at sixty bales; the sale took place a month or six weeks before plaintiff left; the purchasers went into possession and took control immediately on the sale.

CROSS-EXAMINED.

Negro Hester and child have not been at Odom's since witness' return, in April, 1865; were not there now and have not been since; witness did not anticipate a separation between the parties; witness sold and traded off some of the horses; defendant reserved enough provisions to supply his family until the January after the trade, also, the right of residing on the place, the household and kitchen furniture, one buggy, one mule, and one horse, the stock that was absent from the place, and some other things; the sale took place in September, and defendant left in October; defendant has no interest in a saw-mill at St. Mary's; in consequence of the sickness of Zebulon Odom, defendant went to the mill last September to take Zebulon's place, and returned here last Sunday; witness and Zebulon at the close of the war were worth about \$1,000.00; have paid a part of the note given by witness and Zebulon.

Defendant planted in 1865 three or four hundred acres in corn; (may have sworn in answer to bill filed against him and others that there were five hundred acres;) the crop was

a poor one; wagons, oxen, and cart worth \$250.00; defendant stated to witness that he had thirty bales of cotton in Alabama, included in sale to witness and Zebulon; defendant reserved nothing else besides the articles enumerated, except the cotton in Alabama that witness recollects. Mrs. Odom, when she left, said "she was going because she had tried to live there but couldn't do it, Odom treated her so badly; that she was going to take some things with her, and she wished Zebulon to make a memorandum of them." This was objected to, on the ground stated in the motion for new trial, and objection was overruled. If Zebulon made the memorandum, witness does not know it. Witness understood that defendant made a deed of gift to Zebulon and witness of certain negroes in trust for defendant's children, but witness was absent when it was done. This was objected to by plaintiff, and objection overruled. All the negroes embraced in the deed of gift to Warren W. Davis as trustee are included in the copy deed last mentioned, (which was then exhibited to the witness).

No one but the parties were present at the sale of the personal property of defendant to witness and Zebulon.

#### REBUTTAL.

Think all the cotton was ginned, but not packed at the time of the sale; deed of gift to Zebulon and witness was never delivered to witness, and he does not know that it was ever delivered to any one; of the cotton sold by defendant to witness and Zebulon, thirty or forty bags were stained, or storm cotton, sold at from twenty to twenty-five cents.

ZEBULON J. ODOM testified that from 1861 to 1865 he was absent most of the time in Army of Northern Virginia; left in latter part of June, 1861; returned on furlough for a short time in December, 1863, or January, 1864, and was again at home in the latter part of 1864, or early part of 1865; left home last time 7th February, 1865; plaintiff on all these occasions quarreled with defendant, and greatly abused him in January and February, 1865; she accused him of

stealing a dog-hide from one of the negroes, of being the father of Hester's mulatto child, of adultery with other negroes, and especially with Milly; this was before the first separation; witness got home from the army finally in latter part of April, 1865, and for a month or two thereafter the parties got along amicably, and seemed to live together happily, but after that there was an incessant storm; witness never knew defendant to commence a quarrel with plaintiff, he used every effort to avoid it.

Plaintiff came one morning to the piazza, where witness and defendant were and commenced abusing defendant about whipping negro woman Becky; plaintiff said the negro was going to report him, and she would help her, and hoped the Yankees would punish him; she continued to abuse him about having intercourse with negro women, called him an old drunkard, said he would fill a drunkard's grave, and so would his children. Defendant bore with her some time; asked her to go away and let him alone; told her if she did not he would put her out of the house; he laid his hands on her, and removed her as gently as possible; the steps were low, and she was not handled roughly; no more force was used than was necessary to remove her; she remarked she wished he had thrown her down. She missed no opportunity to abuse defendant till she left. Witness never knew of defendant touching plaintiff after that. Defendant was absent when she finally left his home. If James Caldwell was present the morning Becky was whipped witness did not see him, and does not think he was there.

After Mrs. Odom went to Macon for Louisa in July, she was not allowed to carry the keys; this was, as witness thinks, because she had threatened to destroy everything on the place. When witness returned, in April, 1865, Hester was living at Jerry Walter's, and did not live on the place afterwards.

Adam returned about the same time witness did; witness met him on his return in Atlanta; witness has known Louisa since 1861; her character for chastity is not pure.

Generally defendant would seek to avoid quarrels and

difficulties with plaintiff; she usually addressed him in a loud, harsh, and angry voice; she had plenty of provisions, and appeared to have plenty of clothing; heard her after the war trying to sell a dress (think it was a silk dress) to a negro boy Henry. Last September, or early part of October, defendant had thirty-two bales of cotton in Alabama; don't know how much stock he had at home, or how much in Worth County; had household and kitchen furniture, held a note on witness and B. B. Odom for \$11,800.00; also, a note on Way & Felder for about \$100.00; the thirty-two bales of cotton, worth at that time \$135.00 per bale. Defendant's indebtedness at that time was about \$7,000.00; thinks defendant lost about \$9,000.00 by Confederate securities, &c.; thinks profit of farming during the war, after paying expenses, was very little, if anything. Defendant's total expenses in this case, including fees and alimony, witness thinks about \$1,800.00. Defendant has six children, the youngest son of age; two of the children are under age, and four of them had nothing advanced and no provision made for them.

Witness offered in August, 1865, to sell the eight hundred acres of land deeded to him by defendant for ten dollars per acre, but could not get that; considers five dollars per acre a fair estimate of its value now. There were on the place about a half dozen sheep (at the separation), worth \$1.00 apiece; one hundred hogs, worth \$5.00 apiece (not certain as to this); also, sixty-five or seventy bales of cotton; in 1865, about five hundred acres planted in corn and about sixty in cotton made from fifteen to twenty bales of cotton; not corn enough to furnish the place longer than June; very little sorghum syrup on the place; some fourteen or fifteen horses, worth on an average \$125.00 each; wagons, worth \$200.00; carriage and one or two buggies; thinks buggy, which was sold for \$60.00; single cart worth \$20.00; don't know value of Cuba cane or peach brandy.

At time of separation, everything on the place belonged to witness and Berryman Odom, except household and kitchen furniture; one horse, one buggy, one mule, and some other small matters; the purchase was 17th September, 1865, when

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everything sold went into possession of purchasers; purchase money was \$11,800.00; thinks that between \$4,000.00 and \$5,000.00 of this amount has been paid.

Witness was at home when Hester's child was born; thinks it was on the 6th February, 1865, but is not certain. The land was given to witness and the deed executed and delivered 4th February, 1865. In the spring or summer of 1864, defendant spoke of giving this land to witness, and in December, 1864, finally concluded to give it to him. Defendant is fifty-four years old; has no profession, and apart from the means in his possession, no way of making a support except by digging for it. Plaintiff had no children by defendant.

#### CROSS-EXAMINED.

Hester has had a mulatto child since the marriage of plaintiff and defendant; defendant left here in September last to take witness' place in the mills; witness' place at the mills was to manage the finances.

Witness made no arrangement with defendant for compensation; defendant made no charge for his services, but witness expects to pay him what is right; defendant has no interest in the mills; they belong to Z. J. Odom & Co.; the other members of the company are Berryman Odom and Van Valkenburg, each owning one-third; cost \$20,000.00, and are indebted \$7,000.00; defendant left the mills about a fortnight ago. When plaintiff left, she asked witness to take a memorandum of the things she carried off, which witness did; does not remember whether he now has the memorandum or not; it may be at home; the other witnesses have given a pretty correct list of the things carried off, except that plaintiff took a large chest containing her clothing.

Since making a calculation, the fees, alimony, and other expenses in this suit, amount to \$2,100.00; defendant owes his mother some \$5,000.00; he had money of hers, and the use of her negroes; besides that, he owes other debts; defendant gave up the personal property on the place to witness and his brother at time of the sale.

## RE-INTRODUCED.

Knows Adam's general character; it is bad, and witness would not believe him on oath in a Court of justice; says the same as to Ishmael, and of Louisa that her general reputation is not good.

## CROSS-EXAMINED.

Would not believe them because the two former are notorious rogues and liars, and the latter a whore.

ADAM ODOM, colored, at the instance of defendant, testified that he did not tell Bunyan Odom in his (witness') yard last week that he never saw defendant have anything to do with Hester, that all he knew about the matter was seeing defendant push plaintiff out of the door.

Z. J. ODOM, re-introduced, testified that about the last of October or first of November, the cotton was shipped to New York and sold; thinks this was before he and Berryman were made parties to the bill by complainant in this case. The first he knew of quarreling between the parties was in 1861. Mills cost \$20,000.00; in debt \$7,000.00; owned jointly by witness, Zebulon Odom, and Van Valkenburg, each one-third. Defendant owed about \$5,000.00 to his mother for property, use of negroes, and money he got of her; she had some six negroes; defendant had the use of her negroes and other effects about twelve years; they never had any settlement of their accounts, and the amount of the indebtedness is not ascertained; defendant's mother lived with him during that time, but her support would not consume the income of her property.

Addition to Z. J. Odom's testimony, as shown by the brief of evidence. In 1864, when defendant talked about giving the land to witness, nothing was said about troubles between plaintiff and defendant; witness and Berryman bought the carriage; neither of them then was married or had any children. Plaintiff has two children by Caldwell, her former husband,—James, about thirteen years old, and a little girl



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about eight years old. Witness's sisters live on his place,—they are to pay board, don't know what the price will be. Commenced building mill in January, 1866, and completed it in August, 1866. At time of purchase, witness and Berryman, (besides the land given witness by his father,) were worth each, only \$350 in a note on defendant, and a shot-gun.

B. B. ODOM, re-introduced, testified he returned from war last of April or first of May, 1865; Adam returned soon after; when witness returned, Hester was living at Jerry Walters', eight or nine miles off; never saw Hester on the place after that; she had no house or abode there; Adam remained till next Christmas, for next twelve months, at witness' return; Hester never spent a night there; Hester was there last Christmas. Knows Adam and Ishmael; their general reputation bad, and he would not believe them on oath. Knows Louisa and her general reputation; it is not good; it is doubtful about believing her. Adam told witness in his (Adam's) yard last week, that he knew nothing about defendant having anything to do with any women, and all he knew about the matter was defendant's pushing plaintiff out of the door.

CROSS-EXAMINED.

Don't know when Adam went to the war, as witness was absent at the time. In 1865, after returning, witness did not spend more than one or two nights from home; was watchful and vigilant to prevent thieving, and thinks no strange person could have spent a night there without his knowledge.

JESSE WALTERS testified that he knew Hester; in spring of 1865 she went to Jerry Walters' to live, and stayed there till Christmas; knows nowhere else that she lived that year.

CROSS-EXAMINED.

Jerry Walters lives six or seven miles from Odom's; Hester could have gone there at night, and may have done so, but witness does not know that she did.

MILLY (colored) testified that she had known Ishmael

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four or five years; never found him in the house when she sent him to defendant; Ishmael never had anything to do with her; Odom never had anything to do with her at any time.

## CROSS-EXAMINED.

Hester has mulatto child about two years old; witness does not know its father; witness lives with Berryman Odom.

Miss JEMIE ODOM testified that she was defendant's daughter and had lived with him most of her life. When they lived near Dawson, defendant whipped the nurse; plaintiff came to him very mad and abused him; don't recollect the exact time. After moving up here, plaintiff quarrelled with defendant frequently, and always commenced the quarrels. Witness was at school at both separations; heard them quarrel a great many times before and after the first separation. Witness thinks she was at Perry at school, when her brothers came from the war. Plaintiff's conduct was very unkind to defendant; his was kind to her. When plaintiff commenced quarreling with him, defendant would walk out of the house and leave her. Witnessed this treatment in summer, when she came home from Perry.

At first, plaintiff was kind to defendant and his children, and this was so till Miss Lizzie Davis, her daughter, (here in Court,) came down to Dawson on a visit, and she and her mother had a quarrel; from that time, plaintiff's conduct changed, and towards defendant and his children, was very unkind. When plaintiff and defendant were married, she brought with her cloths, and made them up for defendant's children. Plaintiff was amply provided with food and clothing by defendant; remembers but two homespun dresses worn by plaintiff during the war; witness and her sister wore homespun. Defendant never took the keys from plaintiff; she went to Macon, and the keys were not returned to her afterwards.

Miss INDIANA ODOM testified, that while they lived near Dawson, plaintiff frequently quarrelled with defendant; al-

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ways commenced it; and abused him violently. Once she abused him greatly; he begged her to stop; she grew worse; he got up exclaiming, "Oh! my poor children—what will become of them;" took his pistol, started out, saying he would kill himself; a faithful negro followed and brought him back to the house.

After they moved to Macon County, she quarrelled with him almost incessantly; before going to Macon after Louisa, she stood on the steps, rattled the keys in her pocket, and threatened to destroy everything on the place; said, by Christmas there should be nothing in the smoke-house; threatened to have the gin-house burnt. Plaintiff supplied her with food and clothing as well as he could; she told him to buy nothing till he got out of debt; she did not treat witness and defendant's other children, and witness's grandmother (a very old lady) kindly, but quite the reverse.

CROSS-EXAMINED.

After Mrs. Davis's visit, plaintiff's conduct changed to defendant's children. She would make cakes and delicacies for her children, and give none to defendant's children.

DEKALB ODOM testified, that he was twenty-one years old in November last. In 1860, '61, '62 and early part of '63, the parties lived at or near Dawson. During that time plaintiff often quarrelled with and abused defendant. Before Mrs. Davis's visit, she had been kind to defendant and his children; after that she changed, was not unkind, but not motherly. Frequently heard plaintiff quarrel with and abuse defendant; he would try to avoid her, but she pursued him with abuse, and would not let him alone. Between the separations, she abused him violently; he tried in vain to pacify her; she would commence on him on his approach, and abuse him as long as in her presence; heard her refuse to take the keys,—said when she wanted to go into the smoke-house, she would break down the door.

Witness returned from the war in May, 1865. Adam was then there; don't remember seeing Hester; she may have

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been there; thinks she was, but is not certain. Knows Adam's and Ishmael's general character, etc.; would not believe them on oath; would not believe any negro.

## CROSS-EXAMINED.

Defendant has no interest in the mills; took no control on the place after sale to Berryman and Zebulon.

——— EITSEN testified: was present in summer of 1865, when Odom, Spivey and witness and two Yankees were at Odom's to punish Adam for being concerned in stealing some wheat. Plaintiff quarrelled with defendant about this transaction; told defendant they should not whip Adam; ordered Adam to follow her into the house, and said he should not be whipped by a parcel of hoosiers. Adam's general character is bad—would not believe him on oath, nor would he believe any other negro.

Defendant read in evidence, certain *ex parte* affidavits of Adelia Odom, Rose Haugabook, Albert Odom and Adam Odom, taken and filed in the case, and closed.

Plaintiff then read in evidence the note given by defendant for \$3,080, to Warren W. Davis as trustee for plaintiff, dated 27th February, 1865; also a copy deed from defendant to Zebulon Odom and B. B. Odom, dated 17th December, 1864, conveying in trust for themselves and the other children of grantor, certain slaves therein named, which deed was attested by John C. Riddle and George W. Fish, and acknowledged by grantor before John M. Greer, clerk, and recorded in his office 7th February, 1865; also a trust deed from defendant to Warren W. Davis, dated 27th February, 1865, conveying to Davis in trust for plaintiff, one-half of the negroes embraced in last-mentioned deed, subject to her absolute disposal by will or otherwise, which deed was recorded 8d April, 1865; also copy deed of gift from defendant to Zebulon J. Odom, for eight hundred acres of land in Macon County, executed 4th February, 1865, and recorded 6th February, 1865. This deed purports to have been made in Macon County, and was

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attested by L. M. Roberts and John C. F. Clark, clerk Superior Court, Terrell County.

WARREN W. DAVIS, recalled, testified: that the trust deed and note of 27th February, 1865, were given, and the payment of the note held by him was made as a compromise of the difficulties between plaintiff and defendant; that they had been separated, but then they lived together till the last of September or first of October, 1865. At the compromise, defendant promised if plaintiff would return, to treat her kindly.

WILLIAM H. HARRISON testified: he was in New York last winter, and met defendant there, and asked him what brought him there, and defendant said, "I have come to make arrangements for my mills in St. Mary's."

#### CROSS-EXAMINED.

It is customary for clerks, overseers and other agents to speak of principal's property in their control, as theirs, without intending to assert title thereto; don't know that Odom meant he owned the mills.

It was conceded that the witnesses testified that they did not know of plaintiff's having any knowledge of the various conveyances from defendant to his children, or of the sale of the personal effects by him to Zebulon J. and B. B. Odom.

The evidence being closed, the Court charged the jury among other things, as appears by the motion for a new trial.

The jury found the usual verdict for divorce *a vinculo matrimonii*, and "that said libellant do recover from said defendant, (\$12,000) twelve thousand dollars," etc.

Defendant moved a new trial upon the following grounds:

1st. Because the Court erred in admitting in evidence, plaintiff's sayings at time of last separation, in defendant's absence, because it was "*res inter alios acta*, and because defendant was absent.

2d. (This was objection to the colored witnesses because of color, and was abandoned in Supreme Court.)

3d. This was as to the copy receipts, and was here abandoned.

4th. Was as to the antenuptial agreement, and was here abandoned.

5th. Because the Court erred in admitting evidence of the transfers of property from defendant to his children, before the separation.

6th. This applied to the deed from Odom to Davis, trustee, and was here abandoned.

7th. Because the Court erred in charging the jury that throwing water on libellant, if done without provocation, was cruelty, and that if the wife was guilty of like conduct, her right to a divorce would be barred, yet that in such a case her conduct, to justify this treatment, must have been extraordinary and extreme; that opprobrious and abusive language would not justify such conduct; and erred in summing up this head, by omitting any allusion to the fact or any reference to the same, that plaintiff had introduced the chamber pot into the contest,—the attention of the jury not having been called to all the facts and circumstances attending the transaction, as well those in extenuation and excuse, as those in aggravation. (All the evidence was referred to the jury, and no part of it commented on except to tell them if they believed from the evidence, etc., as aforesaid. *Note by the Judge.*)

8th. Because the Court erred in charging the jury in reference to condonation; that plaintiff must not only have known the conduct of defendant, which it is claimed she pardoned, but that she must have been able to prove it; and that suspicion or belief of the conduct without ability to prove it, coupled with subsequent cohabitation, would not amount to condonation.

9th. Because the Court erred in charging as to alimony, that while the jury had no right to assign anything to plaintiff's children by a former marriage, yet they might consider the source from which the property came and their dependence on her, in fixing the alimony,—both because that is not law, and because there was no evidence as to the pecuniary condition of her children.

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10th. Because the finding of the jury is contrary to law and without evidence to support it, and strongly and decidedly against the weight of evidence.

11th. Because the allowance of permanent alimony by the jury, is unlawful in this: that the amount is given to libellant generally and in fee simple; that it is so excessive, and so strongly and conclusively against the weight of evidence, as to show improper bias or gross misapprehension on the part of the jury; and as to shock both the understanding and moral sense.

The Court overruled this motion, and his refusal to grant the new trial on said grounds, is assigned as error.

SAMUEL HALL, GEORGE W. FISH, COBB & JACKSON, for plaintiff in error, made the following points, based upon the authorities cited:

Testimony of servants unreliable. 1st Eccl. R. 211, Waring vs. Waring; 3 Eccl. R. 335, D'Aguilar vs. D'Aguilar.

As to condonation, see Code §1673; 7th Eccl. R. 389, 390, Dillon vs. Dillon; 6th Mass. R. 147, anon.

What is cruelty which is good ground for divorce, etc. 1st Eccl. R. 211, *ante*, 2d Eccl. R. 163, Best vs. Best; 4th Eccl. R. 454, Holden vs. Holden; 312, *ib.*, Evans vs. Evans; 8th New Hamp. R. 307, Poor vs. Poor; 24th Ga. R. 238; 29th Ga. R. 718:

Opprobrious words justify an assault. Code §§4271-4576.

Sayings of Mrs. Odom not *res gestæ*. Code §3096; 3d Ga. R. 513, Carter vs. Buchanan.

Settlement bars alimony. Code §1694; 25th Ga. 186, Killian vs. Killian.

The verdict is wrong because it vested absolutely in the wife, the sum found. Cobb's Dig. 225; Code §§1676, 1693, 1688, 1697, 1699, 1677, 1678, and Killian vs. Killian *ante*.

ELI WARREN, F. T. SNEAD and W. H. ROBINSON, for defendant in error, furnished no briefs.

WARNER, C. J.

The error assigned in this case is the refusal of the Court below to grant a new trial upon the several grounds specified in the motion therefor.

1. Because the Court erred in admitting the declarations of plaintiff when about to leave her husband's house, in his absence, as testified to by Alice Haugabook, Josephine Haugabook, Mary T. Spivey, and Anna V. Spivey. It appears from the record, that when the plaintiff left the house of defendant, she took with her certain articles of furniture, and that the two sons of the defendant were present when she left, but the defendant himself was absent. This evidence was admissible for the purpose of explaining her motives and conduct, when in the act of leaving and taking the articles of furniture with her. See 3694th section of Code.

2. Because the Court erred in admitting in evidence the antenuptial settlement between the parties. This evidence was properly admitted for the purpose of showing the source from whence the property was derived, contained in the schedule. See 1676th section of Code.

3. Because the Court erred in admitting the evidence of the transfers of defendant's property to his children by a former marriage, shortly before the separation of the parties. The transfers of his property by defendant, were alleged to have been fraudulent as against the rights of the plaintiff, and were therefore properly submitted to the jury as evidence conducing to prove that fact, in connection with other evidence which the plaintiff might think proper to introduce.

4. Because the Court erred in its charge to the jury, as to what constitutes "cruelty," under the law. In view of the various grades and conditions of mankind in society, it is extremely difficult to assert any definite rule, applicable to all classes of society, as to what will constitute legal cruelty. Legal cruelty may be defined to be, such conduct on the part of the husband, as will endanger the life, limb or health of the wife, or create a reasonable apprehension of bodily hurt. What must be the extent of the injury, or what particular



acts will create a reasonable apprehension of personal injury, will depend upon the circumstances of each case. The acts of cruelty must be such as to render cohabitation unsafe, or are likely to be attended with injury to the person or to the health of the wife. *Evans vs. Evans*, 4th Eng. Eccl. Rep., 312; *Westmeath vs. Westmeath*, ibid 270.

In view of the facts contained in this record as to the conduct of the defendant towards the plaintiff, there is no error in the charge of the Court to the jury, upon the question of cruelty.

5. Because the Court erred in charging the jury on the question of condonation. The 1678 section of the Code declares that "If there has been a *voluntary condonation and cohabitation*, subsequent to the acts complained of and with *notice thereof*, then no divorce shall be granted." We think that the charge of the Court, as given upon the state of facts disclosed by the record, was substantially correct. Condonation is a conditional forgiveness on a *full knowledge* of all antecedent guilt. *Bramwell vs. Bramwell*, 5th Eng. Eccl. Rep. 232. After a reconciliation, fresh acts of cruelty will revive acts of cruelty, and also of adultery. *Worsley vs. Worsley*, 6th Eng. Eccl. Rep. 249. Condonation is not so readily presumed against the wife, as the husband. Knowledge of the guilt of the husband, and forgiveness by the wife, are not legally to be presumed, but must be clearly and distinctly proved, in order to bar her action. *Durant vs. Durant*, 3d Eng. Eccl. Rep. 319.

After carefully reviewing the several grounds of error assigned to the rulings of the Court below, we find no legal ground upon which (in our judgment) a new trial ought to be granted in this case; and the only remaining question for us to decide is, what is the legal effect of the verdict of the jury as to the sum of money awarded to the plaintiff. By the 1676th section of the Code, it is provided that a schedule of the property shall be filed, and that "the jury rendering the final verdict in the case may provide *permanent alimony* for the wife, either from the *corpus* of the estate, or *otherwise*, according to the condition of the husband, and the source

from which the property came into the coverture." The 1688th section of the Code declares, that "*alimony* is an allowance out of the husband's estate, made for the support of the wife when living separate from him. It is either temporary or permanent." *Permanent alimony* is granted in the following cases: First, of *divorce*, as considered in section 1676; second, in cases of voluntary separation; third, where the wife, against her will, is either abandoned or driven off by her husband—Code, section 1693. *Alimony* is that allowance which is made to a woman for *her support* out of the husband's estate. It is generally proportioned to the rank and quality of the parties. 1st Bl. Com., 441.

By the old law, as it stood at the time of the adoption of the Code, the property was to be equally divided between the children of the parties, unless the jury should think proper to allow either party a part thereof. Cobb's Dig., 225. The Legislature, at the time of the adoption of the Code, must be presumed to have known what the old law was upon this subject. The term "*alimony*," as expressed in the Code, is therefore to be construed in its legal technical sense. *Permanent alimony* is to be granted to the wife only in three cases—First, where there is a total divorce; second, in cases of voluntary separation; third, where the wife, against her will, is either abandoned or driven off by her husband. In each of the cases enumerated, permanent alimony is allowed for the support of the wife out of her husband's estate. In case of a total divorce, is she entitled to anything more? Does the verdict of the jury in this case vest in the wife the absolute interest in the twelve thousand dollars, under the provisions of the Code, or does it vest in her that amount as *permanent alimony* out of her husband's estate for *her support and maintenance during life*, according to her rank and condition in society? When we look to the 1697, 1698 and 1699th sections of the Code, regulating permanent alimony in the other two specified cases, the intention of the Legislature is clearly manifested in regard to *permanent alimony*. Our conclusion, then, is, that it was the intention of the Legislature that, in cases of total divorce, the jury might provide permanent ali-

mony for the wife, either from the *corpus* of her husband's estate, or otherwise, and that permanent alimony means a suitable provision for the *support and maintenance* of the wife, out of her husband's estate, during her life, according to her rank and condition in the community in which she resides.

This construction of the Code, it is said, will operate harshly in this case, because the husband derived most of his property from his wife: still, it was *his property*, and the provision is made for the wife out of *his estate*. But suppose the husband had acquired no property by his wife, yet she is entitled to permanent alimony out of *his estate* for her support and maintenance during life; but would it be just and equitable at her death that the *corpus* of the property provided as permanent alimony for *her support and maintenance out of her husband's estate* should go to her legal representatives instead of her husband or his legal representatives, when she had brought nothing into the family?

The construction which we give to the Code must operate as a general rule, applicable to all cases as to the legal effect of granting permanent alimony out of the husband's estate, where a total divorce is granted. It is quite probable it was the intention of the Legislature, in restricting the wife to permanent alimony for *her support* during life out of her husband's estate, not to offer any inducement for husband and wife to dissolve the marriage contract from merely mercenary motives as to property. The legal effect of the verdict rendered by the jury in this case, under the provisions of the Code, is to vest the amount found by them in the plaintiff as permanent alimony during her life only for her *maintenance and support*, according to her rank and condition in life.

Let the judgment of the Court below be affirmed.

JOHN DOE, *ex dem.*, PHILIP P. CLAYTON, NELSON TIFT, *et al.*, plaintiffs in error, *vs.* RICHARD ROE, *Cas. Ejector*, and SAMUEL PALFUS, defendants in error.

1. Where a decree, for a specific performance, is a link in a chain of title, it must be considered as if it were a deed from the party required to make a deed.
2. When the Court below is dissatisfied with a verdict, and grants a new trial, and no principle of law is thereby violated, and the testimony leaves important points in doubt, which doubts can be removed on another trial, this Court will not disturb the ruling.

Ejectment. Motion for new trial. Decided by Judge IRWIN. Dougherty Superior Court. December Adjourned Term, 1866.

This was an action of ejectment, for a quarter of an acre of land, on Broad street, Albany, to-wit: lot number twenty, being part of original land lot number three hundred and twenty-three, in the first section of Dougherty county, on the several demises of Philip P. Clayton, Peter W. Turthy, as administrator of Augustus R. Rugg, James H. Bishop and Curtis R. Parsons, partners under the style of Bishop & Parsons, and Nelson Tift.

The tenant, Palfus, was admitted to be in possession of said lot at the commencement of the suit. John Jackson was made a party defendant by consent.

Plaintiff introduced PETER J. STROZIER, who testified that he was present at the sheriff's sale of the premises, under *fi. fa.* of John Jackson. The sale was also under the *fi. fa.* of Bishop & Parsons. Rugg and Jackson were present at the sale, which was in July, 1842:

EDWARD RICHARDSON testified: As agent for Bishop & Parsons, he called on A. K. Rugg, their attorney, soon after the sale of the lot, and he told witness Bishop & Parsons could have the lot; witness told Rugg he would take the lot and pay the money. Rugg died a few weeks after without making the title.

Plaintiff also read in evidence the following documents: the original bill, answer and decree in the cause of Bishop &

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*Doe, ex dem., &c., vs. Roe, cas. ejector, &c.*

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Parsons vs. Joseph B. Shores, administrator of Rugg, and the original claim papers at the administrator's sale.

These were objected to by defendant's attorneys, but the objection was overruled.

Plaintiff read in evidence five deeds to said land lot, tracing title from the State to Nelson Tift, as admitted by the defendant. (By consent, these deeds are not described in the record.)

Plaintiff closed.

Defendant read in evidence a deed from George W. Collier, sheriff, to John Jackson, for said lot. The order requiring the sheriff to make this deed was recorded 4th August, 1860, the deed was dated 3d February, 1843, and was recorded 13th December, 1852, and its consideration was ten dollars.

Defendant introduced JOSEPH THORN, who swore that A. J. Swinney went into possession of the lot directly after the fire in 1849 or 1850, and when he went out Palfus went in, and remained in possession till the beginning of this suit.

Defendant also read in evidence an agreement of A. J. Swinney, dated Albany, Ga., 19th June, 1851, acknowledging a renting from defendant in 1849 or 1850, and agreeing to rent for a certain length of time thereafter.

Swinney was said to be intoxicated at the time of the trial, and was not introduced as a witness.

Plaintiff introduced an agreement of A. J. Swinney. It was in substance a lease from Peter J. Strozier, attorney of Young P. Outlaw, and Richard K. Hines, Jr., attorney for Bishop & Parsons, (dated 8th January, 1851,) of said lot until 1st January, 1853.

Plaintiff read in evidence a deed from Green Tinsley, sheriff, to Nelson Tift, dated 5th July, 1842, which had not been recorded, reciting that the land was sold as the property of Clayton.

The jury found for the plaintiff the premises in dispute.

During the term, the defendant moved for a new trial on the grounds—

1st. That the Court erred in allowing the plaintiff to read to the jury the bill of Bishop & Parsons, against Shores, administrator of Augustus R. Rugg, deceased, and the answer

of said administrator, as evidence against the defendant in this issue as to the truth of such allegation, as also the recital in the decree in said case (other than those decreeing conveyances from the estate of Rugg to Bishop & Parsons.)

2d. Because the Court erred in charging the jury that the recitals in said decree that said lot was purchased by said Rugg, in his lifetime, as agent and attorney of Bishop & Parsons, under their instructions, and that said Rugg intended to take the title in their names, but from some accident or mistake the title was made in the name of Rugg, was evidence, whereas his title showed he had no interest in or right to said lot.

3d. Because the Court erred in charging the jury that when the possession of defendant was founded upon or commenced in a fraud, the statute of limitations would not run in his favor, or, in other words, that such a possession as commenced or was founded on a title acquired in and by fraud could not ripen into a statutory title.

4th. Because the Court refused to charge as requested, that if defendant purchased the lot at sheriff's sale, in July, 1843, and took the sheriff's deed therefor, and took possession under said title, and held possession under a claim of right as his property and against the whole world, either by himself or his tenants, for seven years, openly, continuously and adversely, that his title was good as a statutory title, barring the plaintiff's right to recover, though such sale did not pass the real title, at the time of the purchase :

And lastly, because the verdict was contrary to law, contrary to the evidence and the weight of the evidence.

The record does not show what was the charge of the Court, and the Judge certifies that the statements of the motion for a new trial are incorrect. He says he charged that a decree was evidence of the recitals therein between the parties thereto, as though they were contained in a deed and binding on the parties in the same way, and when relied upon as a link in a chain of title, it must be connected as though it was a deed.

He says the Court further charged, that "fraud vitiates all

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contracts, and if proven that possession was obtained by fraud, the statute would not run in favor of the perpetrator of the fraud, so as to ripen into a statutory title, but that fraud would not be presumed, but must be proven like any other fact, and that the taking of the second deed at sheriff's sale by Jackson was not of itself a fraud."

He says he further charged the jury that before the passage of the act of 1852, possession, to be the foundation of a statutory title, must be public, continuous, exclusive, uninterrupted and peaceable, and under claim of right, and that if the jury believed that the defendant, either by himself or tenant, had so occupied the land in dispute for seven years, they ought to find for the defendant.

At this point, attorney for defendant verbally requested the Court to charge in substance what is set forth in said motion for new trial. The Court did not charge in the language requested, but charged the jury that if they believed from the evidence that the defendant, by himself or tenant, had been in the public, continuous, exclusive, uninterrupted and peaceable possession of the lot in dispute under claim and color of title for seven years immediately preceding the commencement of this suit, they ought to find for the defendant.

In all this the Judge thought he was correct, but having failed to charge what constituted a color of title and adverse possession under the act of 1852, and the effect thereof, and thinking that under the circumstances this omission may have influenced the jury, he granted a new trial.

To this order of a new trial the plaintiff in error excepted, and now assigns it as error.

HINES & HOBBS, P. J. STROZIER, for plaintiff in error.

RICHARD F. LYON, JOHN A. DAVIS, for defendant in error.

WALKER, J.

1. The Judge instructed the jury "that a decree is evidence of the recitals therein between the parties thereto as though they were contained in a deed, and binding on the parties in the same way; and when relied on as a link in a chain of title, it must be considered as though it were a deed." We see no error in this; it is substantially what is contained in Sec. 4119 of the Code. As there was no evidence showing any title in Rugg, either by possession or otherwise, we do not see that it was very material whether the record of the case of Bishop & Parsons *vs.* Rugg's administrator, was admitted or rejected.

2. The Court granted a new trial, on the ground that he omitted to charge what constitutes color of title and adverse possession under the act of 1852. Inasmuch as the Judge thought there should be a new trial, and we see no principle of law violated in so doing, and more especially as the testimony leaves some important points in doubt, which can be made clear on a new trial, we are not disposed to control the discretion as exercised in this case.

There are several points which need elucidation. The paper title is shown to be in Tift, and yet both sides attempt to derive title from Clayton. What interest in the premises he ever had does not appear. No deed is shown conveying title to him, nor does it appear from the record that he ever was in possession of the lot. We have already alluded to the fact that Rugg is not shown to have had any title at any time, and still it seems that stress was laid upon the record, introduced by plaintiff, of the case of Bishop & Parsons *vs.* Rugg's administrator. The deed made by the sheriff at the sale, in July, 1842, was made to Tift and not to Rugg. We do not see what the doctrine of possession under claim of right had to do with the case, because it appears that all who claimed the lot showed color of title.

It is uncertain in what character "Swinney went into possession of the lot directly after the great fire in 1849 or 1850." It was said in argument that at the time of the trial



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he was intoxicated, and therefore was not introduced as a witness. By Swinney's agreement of January, 1851, he was the plaintiff's tenant; by his agreement in June, 1851, he recites that he was the tenant of defendant in 1850, and agreed so to continue. If in law he was the tenant of plaintiff in January, 1851, he could not by an attornment in June thereafter defeat the plaintiff's possession. Possibly he went into possession originally as a mere "squatter," and if so, his possession would be in subordination to the title of the true owner—*Stamper vs. Griffin*, 20th Ga. R., 234. Perhaps he went into possession as the tenant of Jackson, as he recites in the agreement of June, 1851; if so, then his subsequent attornment to Bishop & Parsons, in January, 1851, would not change the possession from Jackson to Bishop & Parsons. These suggestions are made for the purpose of showing the uncertainties hanging about the merits of this case, and as reasons why we should allow the re-hearing granted by the Court below. The testimony to remove the most of these doubts is attainable, and we hope will be produced on another trial. We presume the whole facts of the case, as they appeared in the Court below, are not embraced in the record, and that the omission of facts in the case does injustice both to the Court and the counsel. From the points made in the motion for a new trial, and the charges which the Judge certifies he gave, there must have been many facts before the Court below which do not appear in this record. Upon no other hypothesis would the conduct of either the Court or counsel be explicable. We affirm the judgment granting a new trial.

Judgment affirmed.

HOWELL CHERRY, plaintiff in error, vs. JAMES R. WALKER;  
defendant in error.

NOTE. WARNER, C. J., did not preside in this case.

On the trial of an action on a promissory note given in consideration of Confederate notes, the Court charged the jury, "That in determining the equities in this case, you may consider the law read from the Code, (sec. 2723,) authorizing the holder of a note payable in specifics, on failure of payment, to recover the value of such articles at the time the note is due and payable, but you are not bound to do so." Held, that this charge is erroneous, being calculated to make the jury believe that the value of Confederate notes, at the time the note falls due, is the amount for which they should find.

Assumpsit. Confederate Contract. Tried before Judge WORRILL. Taylor Superior Court. April Term, 1867.

Howell Cherry sued James R. Walker on a promissory note, in the usual form, for \$4,280, dated May 4th, 1863, and due 4th May, 1864. In April, 1866, a verdict for the full amount was given, and defendant appealed.

At the appeal trial, plaintiff introduced the note and closed.

The defendant introduced an admission that the consideration of the note was Confederate States treasury notes, loaned to defendant by plaintiff; that at its date, one dollar in gold was worth five dollars of said treasury notes, and at its maturity, one dollar in gold was worth twenty dollars of said treasury notes; and that at the trial, the premium in greenbacks, was thirty-five per cent. for gold.

The Court charged the jury, that it being admitted that the consideration of the note was Confederate currency, the presumption was that the note was to be paid in the same currency; and that in determining the equities of the case, they might take the value of Confederate treasury notes, as proved, at the date of the contract, or the value of the same at the maturity of the note.

And, by request of defendant's attorneys, he further charged, that in determining the equities of the case, the jury might consider the section of the Code, as to notes payable in specifics, which had been read to them, (which gives the value of

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Cherry vs. Walker.

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the articles when due and payable, on failure to pay); but that they were not bound to do so. Verdict was for \$289, with interest and costs.

A motion for new trial was made upon the grounds:

1st. That the verdict was contrary to equity and the principles of justice and equity, and contrary to law.

2d. Because the Court erred in charging that the presumption was, that the note was to be paid in the same currency for which it was given.

3d. Because the Court erred in charging, that in fixing the equities, the jury might take the value of said currency at the date or at the maturity of the note.

4th. Because the Court erred in charging as requested by defendant's attorney aforesaid.

The motion for new trial was overruled, and plaintiff excepted, and assigns error upon the several grounds therein set forth.

CABANISS & PEEPLES, (represented by N. J. HAMMOND,) WALLACE & ROSS, for plaintiff in error.

B. HILL, for defendant in error.

WALKER, J.

In *Evans vs. Walker*, decided at December Term, 1866, the Court below instructed the jury, that the value of Confederate notes at the time the debt became due, was the measure of the plaintiff's rights. There as here, the consideration of the note sued on, was Confederate notes borrowed, and payable at a period in the future, with legal interest. There as here, the notes had greatly depreciated from the time the note was given, until it fell due. We thought the Judge erred, and reversed his ruling. In this case, the charge given by request of the defendant's counsel, is substantially the same as that given in *Evans vs. Walker*. It is true that the Court here tells the jury that they are not bound to adopt the rule prescribed by the Code, sec. 2723, for a note payable

in specifics ; but it was improper to refer to this section at all, as the rule in this case, because it would tend to control the minds of the jury. The ordinance is very broad, and it is better to enforce it according to its terms.

We do not attempt to prescribe general rules which shall apply to all cases under the ordinance. In *Evans vs. Walker*, we announced our views of this ordinance. In that case we said, "That in that class of cases embraced by the ordinance, the proper course to be pursued is this: let the Judge who has the case to try, give the ordinance in charge, the whole ordinance, (not that every part applies to every case that comes up,) and then instruct the jury to consider the whole, not for the purpose of making a different contract from that entered into between the parties, but to ascertain their true meaning and intention, giving an equitable construction to the argument, and then returning a verdict on the principles of equity. We certainly think that the convention intended to give to the jury, more than the ordinary discretion delegated to jurors, which should be respected by the Courts, unless flagrantly abused to the manifest wrong and injury of the parties."

This is as far as a majority of the Court is now prepared to go. Were we to attempt by general rules, to control the decision of future cases, we should probably defeat the salutary provisions of the ordinance. We think it better that each case be decided upon its own peculiar facts, under such of the provisions of the ordinance as may be applicable. While this course will not be very satisfactory to ourselves or to the profession, yet it will advance the ends of justice, and carry out the intention of the law-making power, and therefore we should to pursue it.

Judgment reversed.

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Davis, adm'r, *et al.* vs. Singleton and Black.

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HENRY S. DAVIS, administrator, *et al.*, plaintiff in error, vs.  
WYATT R. SINGLETON and WILLIAM A. BLACK, defend-  
ants in error.

NOTE.—WARNER, C. J., did not preside in this case.

New parties may be added to an original bill, by an amendment in the nature of a supplemental bill; and the representatives of deceased persons may be made parties by *scire facias*.

Amendment. Demurrer. Decided by Judge WORRILL, Schley Superior Court, October Term, 1866.

John Joyce owned an interest in the estate of Jesse Cherry and of Naomi Lilly, deceased. John Springer was the executor of Cherry, and Samuel H. Crawford was the administrator of Lilly.

Joyce, for a valuable consideration, sold his said interest to Burton A. Congleton, and delivered to him an irrevocable power of attorney to sue said Springer, executor, and Crawford, administrator, for said interests. For a like consideration, Congleton sold two-thirds of his said purchased interests to William A. Black and Wyatt R. Singleton, and agreed to prosecute suit for the same, at the common expense, and for the common benefit of said three purchasers.

Congleton filed his bill in the name of Joyce for discovery, *ne exeat*, &c., against Springer and Crawford. Congleton died, and Austin Congleton became his administrator. Crawford died, and his wife administered on his estate; and Springer died, and his estate was administered upon by Henry S. Davis.

Before Springer died, he left with Seaborn Montgomery a sum of money and other assets to meet the decree of the Court, and save harmless his securities on the *ne exeat* bond.

Austin Congleton refused to prosecute said cause.

Said Black and Singleton set forth these facts in a supplemental bill, and prayed that Joyce's name be stricken, because he was an unnecessary party complainant; that they be made the sole complainants in said bill; and that the said administrators of Springer and Crawford, and said Mont-

gomery, be made parties defendant to said bill, without prejudice to said *ne exeat*, and the cause proceed; and that they account with complainant as assignees of said interest of Joyce.

This supplemenal bill was demurred to, for a misjoinder of defendants, and causes of action, and multifariousness, and because the object of complainants could be obtained by amendment to the original bill; and lastly, because complainants' claim is champertous.

The Court overruled the demurrer, on terms as follows: that the administrators of Springer and Crawford be served with *scire facias* to show cause why they shall not be made parties defendant to said original and supplemental bills; and that in the meanwhile they shall not be held to be parties thereto.

Plaintiff in error excepted to this order and judgment, and assigns the same as error.

BLANFORD and MILLER, S. HALL, H. K. McCAY, for plaintiff in error.

B. HILL, for defendant in error.

WALKER, J.

We see no error in this record. The Court decided that an amendment, in the nature of a supplemental bill, might be made; and that the representatives of deceased persons should not be parties to the bill until after they should have been called upon by *scire facias* to show cause why they should not be made parties to the litigation. We think this whole matter was left to the discretion of the Circuit Judge—Code, Sec. 4093—and we see no abuse of his discretion in this case.

Judgment affirmed.

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Martin and Yates vs. Tidwell and Favor.

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WRIGHT MARTIN and JOSEPH G. YATES, administrator of JACKSON MARTIN, plaintiffs in error, vs. M. M. TIDWELL, JOHN FAVOR, *et al.*, defendants in error.

NOTE.—WARNER, C. J., did not preside in this case.

1. There being evidence to sustain the verdict in this case, and the Judge who tried it being satisfied with it, a new trial is refused.
2. A partnership may exist where there is a joint interest in property and in the profits and losses of the adventure.
3. While the conduct of the juryman, Jones, was unbecoming, yet, as it was known to the counsel complaining before the verdict was rendered, it is no good cause for a new trial.
4. Where a Court of Equity obtains jurisdiction for one purpose, it will retain it until complete justice is done to all the parties.
5. In a creditors' bill others not parties may come in after decree, submit to the jurisdiction of the Court, and have their rights passed upon, and participate in a fund to which they may be entitled, according to the principles of equity.

In Equity in Fayette Superior Court. Motion for new trial. Decided by Judge WARNER, March Term, 1867.

The bill charged that in the latter part of 1858, Jackson Martin and Wright Martin purchased of Martin Waldroup a tract of land in said county, with the crop thereon, and the stock of cattle, &c., to farm as partners; that they borrowed from John Favor money to assist in said purchase, and gave their joint note therefor; that they made and delivered to said Waldroup their joint and several note for \$1,137.50, which was in part payment for said land.

The notes are exhibited by copies in said bill.

It further charges that in a due course of trade, and for a valuable consideration, M. M. Tidwell purchased said Waldroup note; that said Wright and Jackson stocked said farm with their respective slaves, and carried on the farm as partners for several years; that Jackson Martin died, leaving the joint property on the farm, including six bales of cotton; that Wright Martin has sold said cotton and holds the proceeds of it; that Joseph Yates is the administrator of said Jackson Martin's estate, and as such he has sold some of the stock and other property of said estate, and some of the

joint property of said firm; that the land (worth not more than \$1,000.00 or \$1,500.00) and the proceeds of said cotton is the only means to pay the debts, because the estate and Wright Martin are otherwise wholly insolvent; that Wright Martin will not pay said debts; and that he will, unless restrained, dispose of proceeds of said cotton to his own use; that he has no family except his wife; that they have heard that he says he will never pay any of said debts; and that the complainants fear he will leave the State.

The prayer is for subpoena, for injunction restraining said administrator from disposing of any more of the firm property or money, except in payment of said debts; that Wright Martin pay said money to a receiver of the Court; and that he and said administrator pay into Court all assets of the firm for the benefit of its creditors, (and for *ne exeat* against said Wright Martin, and general relief.)

M. M. Tidwell having sworn that he could not obtain the sanction of the Judge in time to remedy the mischief feared, the Clerk of said Court issued process directing the Sheriff to arrest Wright Martin, and keep him in close custody till he delivered to the Sheriff said proceeds of the cotton, or gave bond to complainants for \$2,000.00 for the forthcoming of said money to answer the decree of the Court; and that Wright Martin give bond for \$4,000.00 not to depart the State until further order of the Court.

On the 30th January, 1866, the Sheriff arrested Wright Martin, and took bonds in terms of said process.

Complainants, by leave had, amended said bill. Thereby they charged that said land contained two hundred and fifty acres; that said Wright and said Jackson farmed as partners thereon till said Jackson's death; that they had about an equal number of hands, and were each to have one-half the proceeds of the farm; that said administrator has the deed to said land, which has never been recorded; that he has had half of the land appraised as belonging to said estate, and that he intends to sell said half as such; that said Wright Martin acquiesces therein, and thus exposes the land to be taken for individual debts to the exclusion of joint debts; that Wright



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Martin and Yates *vs.* Tidwell and Favor.

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Martin sold said cotton to James M. Austin, who did not pay in full for the same, but owes therefor about one thousand dollars, for which he has given to said Wright Martin a note, since the service of said bill; that their said debts constitute three-fourths of the firm debts; that they have offered Wright Martin indemnifying bonds if he would, as surviving partner, pay the whole or any part of said debts; and that he refused and threatens not to pay any part of them.

The prayer is for discovery from Austin of all the facts concerning the purchase of said cotton and payment for the same (waiving answer by Wright Martin), and for injunction against his (Austin's) paying said note; that a receiver be appointed to sell said land, and to take charge of the proceeds of said cotton and stock, to satisfy the complainants and other firm creditors who may become parties to said bill; and that Wright Martin and said administrator be enjoined from making any disposition of said assets.

It further prayed that the Sheriff, or other suitable person, be appointed receiver, and that he arrest Wright Martin and keep him in custody until he deliver to said receiver all money, debts, or evidences of debt, of said firm, and especially the proceeds of said cotton.

Judge BIGHAM, at Chambers, sanctioned said bill as amended, confirmed what had been done, appointed William W. Matthews, Sheriff, receiver, and ordered injunction and arrest as prayed for.

After the arrest, complainants again amended their bill, by charging that Wright Martin had Austin's note for only \$1,000.00; that he sold the cotton for \$1,240.00, and had applied part of it in paying an individual debt of Jackson Martin to said Austin.

James McElroy and William Thompson were creditors of said firm, and upon request, were made parties complainant in said bill.

Wright Martin alone answered said bill.

The answer admits the purchase; says that the price of the land and stock, &c., was \$2,275.00, but denies that it was made with a view of farming with Jackson, Martin as part-

ner; it states that after said purchase he did send his negroes to said farm, but it was only because he had no home for them, and because he expected Jackson Martin to pay him their hire. In 1863, he called on Jackson Martin for a settlement, and agreed to let said Jackson have the whole of the stock and crop bought with the land, receiving therefor one-half of six bales of cotton then on hand, and half of three or four hundred pounds of lint cotton; and it was then, or about that time, agreed that the land should be divided and each take his share of it. He and his brother Jackson went into the army; Jackson never returned, and the land was not divided. After Jackson's death and administration on his estate, the administrator had half of the land appraised, which Wright Martin did not object to, as he supposed it was proper to sell it and pay Jackson's debts. He and his brother borrowed from Favor \$811.80, for which the note exhibited was given, and they gave Waldroup a note for \$1,137.50; the money borrowed from Favor was to pay in part for the land, and the note to Waldroup was for the balance of the purchase money. He sold the six bales of cotton for \$1,230.00 or \$1,240.00 to James Austin on a credit till the first of May, 1866; after deducting some claims which Austin held against Jackson Martin, he (Austin) gave Wright Martin his note for \$1,000.00, due as aforesaid, which note he had placed in the hands of one of his securities on his bond, and to secure counsel fees. He received in cash for the cotton only \$49.00, and is responsible for half of the proceeds of the cotton to Jackson's estate.

He admits that Yates, as administrator, sold some personal property of Jackson Martin's, but denies that he (Yates) sold any property belonging to him and Jackson as partners, or any joint property, except a corn-sheller, which was bought with the land, and the administrator paid him his half of what it brought.

The land is worth as much as charged; it and the proceeds of the six bales of cotton is all of the joint property. He admits the insolvency as charged, and that he has no family except his wife; but denies any intention to leave the

State, and all collusion or fraud ; says he has not paid complainants, because there are other creditors, and has not said that they shall never have their money ; but said that they cannot collect the same by their bill, because he and Jackson were not partners, and did not farm together as such.

By an amendment to the answer, Wright Martin says that Jackson Martin alone carried on said farm, and had his (Wright's) negroes only part of the time, paying hire for them as aforesaid ; that the labor of his slaves was nothing like equal to that of Jackson's slaves, and denies that he was to receive one-half of the proceeds of the farm, or that he was in any sense a partner in the same. He says that Jackson Martin impliedly owed him for hire of slaves and rent for his half of the land and one-half of the stock purchased. He says that the land is still jointly owned by him and said estate ; that Austin's note for \$1,000.00 was given for the cotton, and is still unpaid ; and that he paid out \$49.00 as a part of the expenses on said cotton. He denies having any assets or evidence of debt belonging to said estate in his possession or control.

By a second amendment to his answer, he says he paid \$25.00 to Williamson Jenkins for hauling three bales of said cotton to Atlanta, Georgia, five dollars to Nathaniel Grizzard for assisting in hauling them ; that he owes \$20.00 to Mary Martin, and to James Austin \$10.00 for repacking one bale, and whatever is right for patching and roping said cotton ; that Austin agreed to take the cotton at forty cents per pound if he were allowed to retain \$177.80 to apply to a note Austin held against Jackson Martin, which he (Wright) agreed to, and though he has never seen the note, and knows nothing of it, he believes it was so honestly applied.

The complainants' evidence was as follows :

JAMES MCELROY swore that he lived near the farm of Jackson Martin ; Wright Martin's hands worked there with Jackson's ; witness ginned the cotton, six bales, of which one-twentieth was witness' for the toll ; Wright sometimes stayed at Jackson's and sometimes at Hobgood's ; Wright

and Jackson both claimed the land ; Jackson claimed all the stock except one mule, which was Wright's.

MR. ——— THOMPSON testified that in fall of 1861, Jackson employed him to oversee Jackson's and Wright's farm. At Fairburn, Jackson asked him what he would work for ; witness informed him ; he said he would see Wright about it ; shortly afterwards, Wright asked witness if he had seen Jackson and traded with him ; witness said "Yes," and Wright said "All right ; I will be satisfied with any arrangement Jackson makes ; do the best you can." Witness went there in fall of 1861, and lived there in 1862 ; left six bales of cotton on the place. Wright had the strongest force ; the hands all worked together. Witness was to receive \$225.00 for 1862, and at that rate for the time in 1861 ; \$164.00 still due to witness ; the bales of cotton were good, weighing from 450 to 500 pounds ; Wright Martin sold it in January, 1866 ; Wright told witness at Hobgood's that he, Wright, had a right to wind up the business ; that he had an interest in it ; that he had a right to sell the cotton and pay witness and the other creditors of the concern ; that Yates ought to let him wind up the business. Wright had two negro women and two girls and one boy (a pretty good plough boy) ; the negro woman had four or five children ; Jackson had a man and two women ; the mules belonged to Jackson. When witness went to the farm, he found provisions there, and when he left, he left provisions there. Witness talked with Wright about being hired as overseer in October, 1861.

The note read in evidence as follows :

"\$811.80. By the twenty-fifth December, eighteen hundred and fifty-nine, we promise to pay John Favor or bearer eight hundred and eleven 80-100 dollars, and if not punctually paid, interest from date, for value received. September 16th, 1858.

JACKSON MARTIN,  
"WRIGHT MARTIN.

"C. CLEMENTS, Security.

"Credit—March 2d, 1861, three hundred and seventy-five dollars."

Mr. GODWIN testified that he saw Wright's and Jackson's hands working together on the Waldroup place in 1861-2-3; heard Jackson say he had six bales of cotton; Wright wished to sell some of it, but Jackson refused to allow it; said he was going to let Favor have it to pay his debt; has heard Wright say he had half interest in the cotton; never heard anything about a partnership.

Jackson said Wright wished something for the labor of his hands; in 1864, Jackson and Wright wished witness to decide how much said work was worth, but they being witness' neighbors, he would not decide. Wright's negroes had several children. Jackson had control of the farm, and owned all the mules, except one young one; Wright bought nothing for the farm. In 1864, Jackson called on witness; Jackson was lingering three or four months; Wright took the negroes away in September or October, 1863.

JOHN FAVOR swore that in 1858 he loaned money to Wright and Jackson to buy land; Jackson told witness during the war he might have the cotton to pay his (witness') debt; that he had heard both Wright and Jackson acknowledge the partnership; Wright said he wished witness to have the money, but was advised to hold it until it was settled by law; Tidwell and witness demanded the money from Wright; he said he would come and see us, but did not come; Wright said he was advised to sell the cotton; Wright and Jackson both present when the note was credited; both said the note was given for money to pay for the land; Wright said Colonel Huie and Blalock had advised him there was a partnership; they farmed together, and jointly owned the land; Wright did not use the word partnership, but said "we"; witness thinks Wright also said Tidwell advised him likewise that there was a partnership.

Complainant read in evidence the deed from Martin Waldroup, executed in Fayette County, Georgia, 1st September, 1858, conveying to Wright and Jackson, their heirs and assigns, in consideration of \$1,800.00, lot number fifty-nine, and northeast corner of lot number forty, in the ninth

district of said county, being two hundred and fifty acres, more or less.

JOHN HUIE testified that Wright represented to him that the farm was in copartnership; that they had bought corn, &c., for the farm; that the cotton was raised on the farm, and wished to know of witness whether he could not sell the cotton, as surviving copartner. Jackson's estate and Wright's are both insolvent. Afterwards Wright seemed to have changed his mind; he came to witness and said there was no partnership. Judgment on Favor's note is against Jackson and Wright jointly; Austin's note was drawn from Blalock's possession by process of the Court.

MR. — THOMPSON, reintroduced, testified that Wright paid him \$40.00 for overseer's wages, and said he and Jackson were both bound for the balance; Jackson employed witness; witness considers both bound to him, and Wright promised he would pay witness when he (Wright) sold the cotton.

Q. C. GRICE testified that he wrote the deed and saw it executed at the date therein specified, and wrote the note which Tidwell now holds and saw it signed; it was given for the land; did not recollect what was said when the deed and note were signed.

M. M. TIDWELL testified that Wright Martin said he had six bales of cotton, and asked whether he could sell it, as surviving partner, and witness told him he could; witness bought the note from Waldroup at ten per cent. discount; Wright said he wished to sell the cotton and pay the debts, and afterwards said he had sold it, and had the money, but would not pay it out except under the law; he showed witness a roll of money.

Z. B. BLALOCK testified that he went with Jackson to see Waldroup, to buy the land; Jackson was living in a rented house, and the land was bought for a home for Jackson; Wright asked witness if he could sell the cotton as surviving partner, and witness told him he could.

Complainant then read in evidence the following note:

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"\$1,137.50. By the twenty-fifth day of December, eighteen hundred and fifty-nine, we or either of us promise to pay Martin Waldroup or bearer eleven hundred and thirty-seven dollars and fifty cents for value received.

"JACKSON MARTIN.

"WRIGHT MARTIN.

"Sept. 21st, 1858."

Complainant closed.

Defendants introduced the following testimony :

Dr. STEPHEN MALONE testified that he practiced for Jackson Martin, and always charged the account separately; that Jackson said he had hired Wright's negroes to work on the farm, and was constantly quarreling about Wright's women and children being so expensive; that Wright had two women, two girls, and a plough-boy; that both owed witness; that witness went to Jackson to buy corn and wheat off the farm—he refused, saying it all belonged to him, that it was enough for him to pay his debts, and he would not pay Wright's debts out of the corn and wheat; their negroes worked together on the farm; Wright was single, had no home, sometimes stayed at Fairburn and sometimes at Hobbard's; owned more negroes than Jackson.

WRIGHT MARTIN testified that, in 1858, Jackson asked him to assist him to buy a home; he said he did not like to sign notes, and Jackson said unless he did assist him, he (Jackson) would have to sell his negroes; as the negroes came from their father's estate, witness did not wish them sold, and he and Jackson bought the land together, to be divided when witness desired it done; Jackson moved on the farm; witness' negroes were hired out the first year or two; witness went to the war, and sent his negroes to Jackson's home; Jackson said he would pay witness what was right for their work; in 1862, witness wanted pay for said hire, and Jackson said witness could have half of six bales of cotton therefor; witness said it was not enough; they proposed to leave it to Godwin—he refused to decide, and witness then agreed to take said offer. In the summer of 1863 witness took his

negroes away ; he never got a bushel of corn or other produce raised on the farm ; after Jackson's death, his administrator, Yates, said half the cotton was witness', and he wished to sell it ; witness said, let's sell it and pay the security debts. Witness and Yates then agreed to leave the question to Blalock, Huie and Tidwell whether the cotton was copartnership property or not. Tidwell told witness to sell the cotton, that it was copartnership property ; witness told Tidwell he (witness) did not know what it took to constitute a copartnership. Tidwell came to witness and said he wanted his money ; witness promised to see him in Fayetteville—promised twice but saw him only once ; he told witness to pay him four or five hundred dollars, and say nothing about it, and took witness into a grocery and treated him. Witness paid Thompson forty dollars for Jackson ; witness never told Thompson he was bound for his overseer's wages ; witness got half the cotton for hire of his negroes ; witness told Tidwell and Favor that he would see them in Fayetteville on Wednesday, promised twice but saw them only once ; came to Blalock's and to town, but did not go to see Tidwell. Tidwell and Favor did promise a refunding bond if witness would pay them ; witness did not recollect whether he met Blalock the first or second time when he promised to see him ; did not recollect seeing Favor when witness saw Tidwell in town. Huie said if witness paid Tidwell he would do wrong ; that witness had better watch Tidwell ; that half of the cotton money ought to go to the administrator. Witness hauled off the cotton in day-time and sold it, acted under Tidwell's advice ; witness told Tidwell that Blalock and Huie said it was not a partnership, Tidwell said it was. Witness regarded Huie as his counsel, and asked him if he could sell the cotton. Huie said he would do all he could for witness. Blalock and Huie told witness it was a copartnership before the cotton was sold. Witness did ask Brack Blalock what was a partnership, and he said it was a hard question. Witness sold the cotton January 20th, 1866, to J. M. Austin, for \$1,226.00. Austin paid Witness \$49.00 to pay expenses, and was to cancel note on Jackson Martin and give witness note due 1st May, 1866,



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for \$1,000.00. Witness did not consult an attorney in Atlanta, though he spoke to Colonel Calhoun about a case in Fayetteville. Austin said execution might be levied on the cotton; witness said it could not, under the stay-law; witness did not tell Austin he was selling as surviving copartner, but sold the cotton as witness usually sells cotton. There was no copartnership; we bought the land jointly, were to divide it; witness went to the war, and it was not divided. Witness had no interest in the crop: Tidwell wanted money before the cotton was sold.

J. L. BLALOCK swore that he told Wright Martin to sell the cotton and pay one-half to the administrator.

The defendant closed.

Complainants read in evidence the following note:

"\$1,000.00. By the first day of May next, I promise to pay Wright Martin or bearer one thousand dollars, for value received. This 20th January, 1866.

"J. M. AUSTIN."

JOHN HUIE, re-introduced, testified that he was in Blalock's back-room when Tidwell and Wright Martin conversed about the cotton; Tidwell proposed what was fair. We then walked out; Tidwell and Wright stopped at the horse-rack; witness did not hear all they said; heard all till Wright mounted his mule. Wright talked with witness three times about this cotton, first time merely asked witness' opinion; he proposed to employ witness, and witness said he was willing to represent him against the administrator but not against the creditors, as witness held Favor's claim for collection; witness forgot to tell him that he had Favor's claim in first conversation.

M. M. TIDWELL, re-introduced, testified that he told Wright Martin to pay him and all the other creditors some money, and they would let him keep some as a nest-egg.

Here the evidence closed.

The Court charged the jury (after charging as to the law of partnership, which was not excepted to), that a partnership might exist when there was a joint interest in property and a

joint interest in the profits and losses of any adventure or enterprise; as when one partner is not known, yet if he is jointly interested in the profits and losses of the particular business in which the parties are engaged, the law will regard him as a partner in that particular transaction.

To this charge defendant's solicitors excepted.

The verdict of the jury was, "that James M. Austin do pay into the Clerk's office of this Court one thousand dollars, with interest from the 1st day of May, 1866, by the first day of April next; and after application of that amount to complainants, *pro rata*, that, on the first Tuesday in November next, after thirty days notice being given, the Receiver or Sheriff will sell the copartnership premises, containing 250 acres of lot No. 59, and fifty acres of lot No. 40, as contained in said deed, and that said Receiver or Sheriff pay the proceeds to complainants, *pro rata*, and that defendants pay the costs."

During the term a new trial was moved for, on the grounds:

1st. That the verdict was contrary to the evidence and decidedly against the weight of evidence.

2d. That the Court erred in charging as aforesaid.

3d. Because one of the jurors who tried the case, (C. S. Jones,) while the case was being tried and before it was submitted to the jury, said, in presence of two of his fellow jurors, and in hearing of counsel engaged in said case, that there was no use for the lawyers in the case to make speeches to him, for his mind was made up, and they could not change it by anything they could say.

In support of this last ground, plaintiff in error read two affidavits as follows:

Affidavit of R. C. BRIDGES, who swore that, during said trial, and before the case had been submitted to the jury, at a recess of the Court, said C. S. Jones remarked in the presence of him and others, that his mind was made up, and it would not do any good for the lawyers to speak to him, as they could not change him by anything they could say:

Affidavit of JOHN D. STEWART, (one of defendant's solicitors,) who swore that, during said trial, after the evidence

was closed, but before any argument or the charge of the Court, during the recess for dinner, and while deponent and J. Q. A. Alford were walking towards the hotel, three of the jurors trying said cause, to-wit, R. C. Bridges, Burket Rentfro and Charles S. Jones, were walking before them, and said Jones remarked to the others that there was no use for the attorneys to make speeches in said case, as his mind was made up, and nothing they could say could change him. He could have been heard five or eight yards.

Solicitors for defendant in error produced the affidavit of said JONES, who swore that he remarked to Bridges and others of the jurors (at time specified in the other affidavits), that he did not think it worth while for the lawyers to speak on the case, and further, he swore that he had not then made up his mind, and that he did not say to Bridges that he had made up his mind, and that it was unnecessary for the lawyers to speak, and that he thinks all the testimony had been given in when he spoke as aforesaid.

The Court refused a new trial. Defendant's counsel excepted, and assign as error the grounds aforesaid.

J. L. BLALOCK, J. D. STEWART, and J. Q. A. ALFORD, for plaintiff in error.

TIDWELL & FEARS, and JOHN HUIE, (represented by N. J. HAMMOND,) for defendant in error.

WALKER, J.

1. The evidence in this case was conflicting; perhaps it preponderated against the verdict; but, as there was a considerable amount of evidence in favor of it, and the Judge who presided on the trial was satisfied, we will not disturb it.

2. The second error alleged, is that the Court charged the jury "that a partnership might exist where there was a joint interest in property, and a joint interest in profits and losses of any adventure or enterprise." If there be error in this charge, it was not such an error as defendants below can complain of. The Code, §1892, says, "A joint interest in

the partnership property, or a joint interest in the profits and losses of the business, constitute a partnership as to third persons." The rule laid down by the Court required more proof to constitute a partnership than the statute does—he required both a joint interest in the property and in the profits and losses.

3. While the conduct of the juryman (Jones) was unbecoming for a man acting under the solemnities of an oath, still, we cannot for this cause set aside the verdict. It is the duty of the jury to hear all the evidence, and all the reasons urged by counsel in favor of their respective sides of the case, as well as the law given in charge by the Court, and when the case is thus submitted to their determination, *then* proceed to make up their verdict *and not before*. The verdict should speak the truth of the case, and until the jury hear the whole case their minds should be entirely free, so that upon an impartial consideration of all the facts and the law applicable thereto, they may do equal and impartial justice.

We might not have granted a new trial in this case, if the the juryman's misconduct had been unknown to the counsel, until after the rendition of the verdict; but certainly we ought not to do so when the counsel, knowing the facts, chose to take his chances before the jury notwithstanding. If, with a full knowledge of the facts, he permitted the trial to proceed, he must submit to the consequences. Doubtless if the matter had been brought to the knowledge of the Court at once, he would have taken such action as would have been proper under the circumstances.

4. When a Court of Equity obtains jurisdiction for one purpose, it will retain it, until full and satisfactory justice is rendered to all the parties concerned. *Walker vs. Morris*, 14 Ga. Rep., 323. We think, therefore, the Court very properly so moulded its decree as to do complete justice and settle the entire partnership business.

5. We intimate no opinion as to what may be the rights of others, not before the Court, in portions or all of this property. This being a creditor's bill, others may be heard here—

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after, in the assertion of their rights, if such rights exist. *M. & W. R. R. Co. vs. Parker*, 9 Ga. Rep., 394-6; *McDougald vs. Dougherty*, 11 Ga. Rep., 588.

Judgment affirmed.

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THOMAS C. HOWARD, plaintiff in error, vs. SAMUEL A. DURAND, defendant in error.

1. A Court of equity will enforce obedience to its orders by attachment.
2. The action of the Superior Courts in punishing parties for contempt, will not be controlled, except they abuse their discretion.
3. In some cases the punishment of a party for a contempt, is a remedial proceeding to which the opposite party is entitled; though it may not be necessary for the vindication of the authority of the Court.
4. In such a case, if the Court below fail to give the party his rights, this Court will correct the error, and grant the party that relief to which he is entitled.
5. Where a party consents to the violation of an injunction granted at his instance, and takes upon himself the management of the case, he cannot subsequently have the opposite party punished for such violation.
6. A Court of equity will not lend its punitive powers to one party, to coerce the opposite party into the making of new stipulations to which he had never agreed; nor under pretence of punishing for breach of an injunction, attempt to enforce a contract made subsequent to its sanction.
7. Equity will enforce the rights of parties; and those who invoke its aid, should not by contract render nugatory its processes.

Motion to attach for violating injunction, in Fulton Superior Court. Decided by Judge WARNER. April Term, 1867.

This bill was filed by Thomas C. Howard against Frederick A. Williams and John C. McLean, for account and settlement, and against Samuel A. Durand for account, settlement and injunction.

The facts as set forth in the bill are substantially as follows:  
In March, 1857, or 1858, complainant, John S. Williams,

John H. Lovejoy and H. L. Currier, composed "The Atlanta Spoke Company," manufacturing spokes and hubs for carriages. They were to furnish equally the necessary capital, and equally share the profits and losses of the business. John S. Williams and Frederick A. Williams were at the same time, partners under the style of F. A. & J. S. Williams, manufacturing furniture, and owned valuable water power near Atlanta.

Before any work was done by "The Atlanta Spoke Company," Lovejoy sold his interest therein to F. A. Williams, and said Currier sold his to F. A. & J. S. Williams.

Complainant consented to these changes, and he and said Frederick A. and John S. agreed to continue under said first name, they owning one half and complainant the other half, with the privilege to said Spoke Company of using said water power as long as said Spoke Company desired it, paying F. A. & J. S. Williams for such use, one dollar per day.

The Atlanta Spoke Company thus constituted, bought much machinery, consisting of mortising machines, lathes, pulleys, belts, etc., suitable for said work, and a patent spoke lathe, known as the Burn lathe, with the right to sell said lathe in Alabama, Mississippi, Texas, Louisiana, Georgia and other States.

Said articles cost \$12,000, and buildings, etc. to operate the same cost over \$2,000, one-half of which sums complainant paid.

Complainant having confidence in said Frederick A. and John S. allowed them the exclusive management of the business, and they so managed it till John S. died. This was some time in 1858. Frederick A. took the interests and rights of John S., as survivor of F. A. & J. S. Williams, and he and John C. McLean, (who had bought one-half of F. A. Williams's interest,) and complainant continued the business upon same terms and under same name, till about 1st January, 1861. Said Williams and McLean exclusively managed the business. They sold \$5,000 worth of spokes and hubs, the cost of manufacturing them not exceeding two thirds of that amount. They sold several of the Burn lathes,

with the rights and privileges attached thereto, at a profit of \$4,000. Complainant is entitled to one-half of said profits.

Their employees went into the army and the work stopped. There was then on the premises finished and unfinished hubs and spokes, worth \$6,000 or other large sum, a rim binder invented by E. L. Morton, worth \$500. By contract, Morton was to patent this, and the Company had a right to use it as long as it wished. That use is worth \$1,000 per year. The said water power was worth to the Company \$1,000 per year. All the machinery and work of the Company was on the premises.

In April, 1861, F. A. Williams became, from disease, unable to attend to business. On the 21st August, 1862, Williams and McLean sold one-third interest in all the lands and improvements, with the water power, mills, machinery, engines, lathes, tools, patterns, stock of all kinds on the premises or at the mills, finished and unfinished work in the shops, to Samuel A. Durand, and then and there formed a partnership with him, in the business of manufacturing furniture.

In September, 1862, Durand bought out McLean's interest in this firm, and afterwards bought out Williams's interest therein. Complainant had no notice of the sales.

Although no intention of defrauding complainant in this trade, is charged to Williams and McLean, yet they put Durand into possession of all the property of said Spoke Company, which was in said mills, shops and other houses on said land.

Durand bought with notice of complainant's rights. Complainant has offered to furnish one-half of the necessary capital, but Durand denies him any rights in the premises, and is making spokes and hubs on his own account, and getting large profits by contracts for the same.

Complainant has offered to sell out to Durand or buy him out. He has offered to sell the whole and divide with Durand. Durand will do neither, nor will he submit their claims to arbitration.

Machinery being very scarce, this is now worth double the

original cost ; it is encumbered by no debt, and with sufficient hands, fifty thousand dollars *per annum* profits could be realized by making spokes and hubs, so great is the demand for them by the Confederate States and others.

Durand is realizing these profits, and refuses to allow complainant to participate therein, and is wearing out said machinery and consuming said material.

After the other prayers usual to such a bill, is a prayer for injunction against Durand, enjoining him from selling any of the finished or unfinished material and work on hand belonging to said Spoke Company, from running, using, selling or disposing of any of the machinery, mortising machines, pulleys, belts, patterns, rims, lathes, etc., belonging to the said Company, until further order.

The injunction was granted by Judge O. A. Bull, 9th January, 1863. Injunction issued, and Durand was served 16th January, 1863. There was a return of *non est inventus* as to the other defendants. Durand has not answered the bill.

At April Term, 1866, it was represented to the Court, that Durand had violated said injunction by selling and otherwise disposing of all the finished and unfinished work and materials of said Company, with its machinery, heretofore enumerated.

Thereupon he was ordered to show cause why he should not be committed for contempt.

At that term, Durand, for cause, denied that he had violated said injunction, that he had sold or disposed of any of said property ; that he had used, sold or disposed of the machinery, and stated that a short time after the service of said injunction on him, his shops, machinery, water-power, etc., including the machinery mentioned in said *rule nisi*, was seized and impressed by Major Norman W. Smith, Chief Inspector of Field Transportation, of the Confederate States Government, and was used by him up to a period within a few days of the fall of Atlanta, when said machinery was carried or sent by the agents of the Government, to the city of Augusta for safety and to prevent it from falling into the hands of the enemy ; and afterwards when Augusta was threatened, it was removed



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to Greenville, South Carolina, where it still is, so far as he knows, subject to the decision and decree of the Court.

In September, 1866, Durand, "by way of amendment to his said answer," further answered, that shortly after service of the injunction, and after he had stopped his operations in obedience thereto, complainant and he commenced negotiations for a settlement of their said controversy; that he, as he believed, had purchased all of said machinery, etc., from F. A. Williams and McLean, in a trade for their land, water-power and manufacturing establishment, to which the machinery of the Atlanta Spoke Company was attached, without any reservation having been made.

Defendant, in reply to a proposition made by complainant to purchase said machinery, stock, etc., on the 11th February, 1863, wrote as follows:

"Colonel T. C. HOWARD:—Your proposition to purchase the machinery and stock heretofore belonging to the Atlanta Wheel and Spoke Company and now in my possession, (one-half of which is claimed by you,) is hereby accepted; the price is understood to be six thousand dollars, to be paid by you to me and (upon) delivery of the property, said property to be delivered whenever a certain contract for six hundred wheels, which are now being completed, shall be ready for delivery.

"I understand that you are to have the benefit of all the net profits arising from said wheels, which profits are to be deducted from the six thousand dollars you are to pay me for the property.

"I further understand that Captain E. L. Morton is to select out the property sold, and to assist in preparing it for removal from my premises; also that I yield my claim to any hand or hands now in my employ, whom you may wish to employ for any purpose, and work for you myself at just compensation.

"I further understand and hereby agree, that in case of failure on my part to carry out the sale and delivery of the property above-mentioned, I forfeit and pay over to you the sum of ten thousand dollars as fixed and liquidated damages. On the other hand, should you fail or decline taking the ma-

chinery, etc., and tender me the money as above, within ten days after I shall have announced ready to receive it and deliver the property sold, you are to renounce all claim or claims whatever to said property, and yield the same to my benefit.

SAMUEL A. DURAND.

*Test.* J. T. LEWIS.

"If the foregoing recital of our trade is in accordance with your understanding from what Captain Morton verbally communicated to you, then endorse below, the words 'Ratified and agreed to, this 11th February, 1863, in presence of.' Let Captain Morton be the custodian of this paper till the trade is either consummated or abandoned.

S. A. DURAND."

Complainant, in presence of said Lewis, wrote on said letter, "Ratified and agreed to, this 11th February, 1863," and signed the same.

Durand says this agreement settled the injunction to all intents and purposes, and remitted the parties to their respective rights. He urges that this view is proven by the fact that in March, 1866, Howard brought suit against him on said paper, in the Inferior Court of said county, for ten thousand dollars liquidated damages, as appears by exhibited copy of the declaration.

He therefore insists that he cannot be liable for any violation of the injunction after 11th February, 1863. He says he has not violated said injunction, the same having been virtually dissolved, and said case settled by said contract; and he feels confident that complainant so thought and understood; which confidence, he says, is strengthened by no step being taken from that time till April, 1866, to move in this case.

At April Term, 1867, said motion being in order and the parties ready for trial, the following evidence was submitted:

Affidavit of complainant, (sworn to in open Court, April 18th, 1866,) stating that Durand had violated the injunction by renting out the machinery and privileges of the Atlanta Spoke Company, to one Major Hawes, in 1863, who used it for the Confederate States Government; that Durand also sold and otherwise disposed of a great deal of the material and

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work, finished and unfinished, on hand when the injunction was granted; that he sold spokes and hubs to Edward Gardner of said county, and offered to let him have as many as he wished; that he sold spokes and hubs to Mack, a negro; that he sold or gave to one Winton, of said county, spokes and hubs, and a rim or wood binder which was very valuable; that he has sold, given away or otherwise disposed of, or allowed to be wasted or destroyed, the whole of the balance of the machinery, tools, material and work on hand when the injunction was granted; that these sales were to persons and for sums unknown to complainant, and without his consent, and against his wish:

Affidavit of EDWARD GARDNER filed in office, April Term, 1866, which stated that on or about 15th April, 1863, he purchased from Durand, spokes, hubs and rims, which were known at the time of the purchase as a part of the stock of the Atlanta Spoke Company; that he is certain as to the spokes and hubs, and is almost certain he bought rims also, that he knows of his own knowledge that said articles belonged to the Atlanta Spoke Company, and that Durand told him they were of the old stock, and had been seasoning three years, and that he could get as many as he might need thereafter, as he Durand, had thousands of dollars worth of well seasoned stock on hand, that he paid Durand therefor a stirrup machine worth \$200, that he is a carriage-maker and knows what he says, and that Durand broke several spokes to show him that they were seasoned:

Affidavit of G. B. TEDDER stated, that he was in Durand's employment in the latter months of 1863, that he heard Durand say that he had been trying some time to rent his property known as Peachtree Mills, to the Confederate Government; that he did rent said property, including the hub and spoke and rim machinery, as deponent thinks and believes, to Captain Green and Major Hawes, and from what he heard Durand and said Green and Hawes say in repeated conversations, he has not the least belief that said property was seized; that a large and valuable lot of manufactured stuff was on hand, worth, in his opinion, several thousand dollars; that Durand

sold, and he sold, by Durand's request, hubs and spokes made a considerable time before the sales :

The answers of Wm. F. HAWES to interrogatories, substantially to this effect. He had in his possession the contract with Major Norman W. Smith, Chief Inspector of Field Transportation for District, No. 2, C. S. A., as all contracts had to be made in his name. Captain John W. Green, Inspector of Transportation on the field, received a letter from Durand about the first of February, 1864, proposing to rent a manufacturing establishment on Peachtree Creek, and I was ordered to inspect the property as I had the locating of repair shops of the army. I immediately went with Captain Green to inspect it, and agreed to the use of all the machine shops and machinery, all of take it on Durand's proposition, which was : I was to have the surrounding houses, (except Durand's dwelling) the arable land on same side of creek as was his dwelling, for \$2500 *per annum*. The price of timber, lumber, &c., was mentioned in the contract.

The contract was sent to Augusta for Major N. W. Smith to sign. After I had possession and had been working the shops some two weeks, Durand refused to sign the contract as made and sent to Smith on his proposition. I telegraphed Smith and he came to Atlanta that night, about the first of March, 1864. During that month I received an order from Captain Green to impress the property, but Durand had signed the contract before I notified him that I had the order.

The contract, or a true copy which I had, is lost. I bought at the shops, under that contract, 44 gallons lard oil, 108 pounds paint, 10,000 feet seasoned oak lumber, 8,000 large wagon spokes, 12,000 small spokes, 1200 wagon felloes, 395 large and 200 small wagon hubs, and 300 pounds band iron, 100 pounds Swede iron, 500 ditto, 12 wheelbarrows, 15,000 brick, 15 pounds babbitt metal, 300 pine trees at the works. I rented the property about the 1st of February, 1864, and left in July, 1864.

I do not know the value of the material on hand. All the lumber, such as hubs, spokes, bedstead and chair furniture,

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was destroyed by the enemy and citizens. Durand took away nothing except the finished chairs. Durand let Porter have the machinery out of the old flour-mill between the saw-mill and machine shops, for a distillery, in which he and Porter were partners.

By orders from my superiors, in July, 1864, I moved the machinery first to Greensboro, then to Augusta, and part afterwards to Washington, and part to Greenville, South Carolina. I did not consult Durand about moving it. I paid him \$1,250 I think, as rent. Durand told me after he had signed the contract that he knew I had an order to impress, and he thought it best to settle it in a friendly way. He and Porter wished to erect a distillery in one of the shops which I had rented, and I refused; this was Durand's reason for refusing to sign the contract.

GEORGE H. SULLIVAN, in answer to interrogatories, said substantially, that about the 1st of November, 1865, Durand showed him a list of machinery (which he said had been at Williams' Mills) for manufacturing hubs, spokes and rims, and they entered into a contract of partnership to make hubs, spokes, &c., in connection with the cabinet business, by which I was to control the machinery for five years from 1st of January, 1866, &c. He sold me half of the material on hand which consisted of about 8,000 spokes, some artillery wheels and chair stuff, and he sold me a quantity of wagon, buggy and artillery timber. He sold to me, for a term of five years, a complete set of spoke and hub machinery, representing that it had successfully operated at Williams' Mills till the Federal troops threatened the place, when it was refugeed away. Shortly after this, he told me he had paid a man \$200 to go for it and deliver it to me.

In answer to cross-interrogatories, he stated that he had no interest in the suit; that he had had no difficulty with Durand only what had grown out of suits by Durand against him, and that he had no personal enmity whatever against Durand.

Wm. G. Harris' interrogatories were to this effect:

I went to Williams' Mills 1st September, 1865. There was no machinery of the Atlanta Spoke Company there then,

but there were about 6,000 spokes, some of them slightly damaged, and some artillery wheels, no rims nor hubs. By arrangement with Durand, I sold all the material, and gave him one-third of the proceeds. I sold one hundred spokes for \$7, 5,000 spokes to A. T. Fenney at  $3\frac{1}{2}$  cents each. Durand got \$40 for four wheels sold by himself. Durand sold me two-thirds of the machinery of the establishment and wished me to go for it.

Durand afterward sold this same machinery to George H. Sullivan without my knowledge or consent. Durand said the machinery was ample for making buggy spokes, rims and hubs, and wished me to get workmen and to do a carriage-making business. This all occurred about September, 1865.

LEWIS J. PARR testified by interrogatories, that he knew the property of the Atlanta Spoke Co., at Williams' Mills, on Peachtree Creek. It consisted of two spoke machines, two polishing belts, augurs, chisels and other tools, one lathe and mortising machine, and one machine for building rims for buggies, wagons, &c., with shafting, pullies, belting, &c., to drive the machinery, one steamer for steaming rims, some 12,000 or 15,000 unfinished spokes of different sizes, about 30,000 finished spokes of different sizes, for buggies, wagons, omnibuses, &c., considerable spoke and hub timber, with lease for about two years from 1st January, 1863, of water power, and room in the houses to run the machinery.

It was worth \$8000.00 on gold basis, and cost much more than that. Complainant had one-half interest in it, and had invested therein prior to April, 1861, about \$7000.00.

Before Durand made his purchase he asked Parr about said property, and what he thought it was worth. Parr told him that it was a good enterprise, worth from \$12,000 to \$15,000 at that time. Durand asked him if Howard wanted to sell his interest, and what it had cost. Parr informed him that he knew well what Howard had paid for his half interest; that it was from \$6,000 to \$7,000, but that he did not know whether Howard would sell.

Parr was Howard's agent and paid all or nearly all of said money for him.

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EDWARD L. MORTON was examined by interrogatories. He testified as to the organization and changes in the Atlanta Spoke Company in substance as stated in the bill; the purchase of Williams' and McLean's interests by Durand. He stated that from the organization he had been the confidential adviser and foreman in the business, and knew the workings of the same; and that Howard, at time of Durand's purchase, owned one-half of the Atlanta Spoke Company, and this fact was recognized by everybody connected with the works. It was costly machinery, and from what Williams and McLean had said to him, he supposes it was worth, when Durand came in, \$10,000.00 or \$15,000.00. He was Durand's foreman, and knew several propositions from him to Howard were sent, looking to a settlement of their controversy.

He was the bearer of the written proposition set out in Durand's amended answer, and after Howard accepted it, he was the custodian of it as their common friend. After the acceptance, Howard deposited \$6,000.00 in the Georgia Railroad Bank, in Atlanta, and took a certificate of deposit therefor. A memorandum of the substance of the agreement was entered on the certificate by Howard, and he delivered witness the same with authority to draw the money; at Howard's request, he took two wagons and went for the machinery, after he was perfectly assured that all was right for Durand's interests; he thought Howard had fully complied with the contract, and he was acting as much for Durand as for Howard; he says, "As will be seen by the ten days' limit in agreement between Howard and Durand, witness was bound to feel and act as instructed by both parties; the certificate of deposit endorsed as above stated, was taken by me and shown to Durand when I went for the machinery, and witness never dreamed that any objection would be urged to the delivery of the property or acceptance of the money; there was no objection to receiving the money, but Durand declared that not one cent's worth of the property should be taken away till he had received every dollar of the money. I considered this bad faith to Howard, so said, stating to Durand at the

time that Howard's complaint now was that he (Durand) had all the advantage, and that now, as a mutual friend, to give him the cash value of the property as agreed on, and let him at the same time have legal and actual possession of the same, was not the justice I had agreed to see done, and thus and for this reason the whole thing fell through. I offered to receipt him for each load as I took it away, and as soon as there was a fair and substantial compliance by him, to pay him the whole amount in cash."

He cannot state the value particularly, but the machinery was the best in use, ample enough for a business of \$50,000 *per annum*, and the manufactured stock very large and perfect, perhaps more so than any similar one south of Newark, New Jersey. Parties employed with Durand told witness that Major Hawes rented it and it had been scattered about. He is a mechanic, long acquainted with such machinery, and inventor of valuable machinery. With the facilities of the Atlanta Spoke Company, &c., "it is a moderate estimate to say that \$30,000.00 *per annum* might easily have been realized in good value for the last of year 1863 and first of 1864, so great was the demand for such things." He answers that he never had the slightest interest in the case.

Durand's solicitors read the affidavit of A. D. H. P. SHUMATE, who swore that when the injunction was served he was in Durand's employment, and so continued till Major Hawes came and took possession as Government officer; and that during that time neither Durand nor any of his employes used said machinery or any of the material belonging to the wheel business. He lived at said mill many years before the war, and since; worked for Durand and for the Government there; and Government agents took away said machinery and material to Augusta.

They also read the answers of A. R. SALLENBERGER to interrogatories. He said he had read the written contract alluded to; that he is a mechanic, and considered said machinery and material fully worth \$6,000.00 in the then currency, when the contract was made. He was working for Durand making artillery wheels when he heard of the injunction, and



stopped the work on that account. Durand said he was ready to deliver the property to Howard. It was not delivered to him, or Morton, his agent, who called for it. Durand proposed to deliver it to Morton when paid for. Morton said he would not pay for it till he had it in the depot or cars at Decatur. Durand proposed to deliver it at the mills when paid for. Morton stated that he had a certificate of deposit to pay for the same. Witness don't remember seeing the certificate. Morton said he would carry the property to Decatur himself. He states that he has no interest in the case.

By a second set of interrogatories, this same witness stated that he stopped the work on the wheels about one month, and that Howard told him that he had bought out Durand's interest in said machinery and materials.

The Court decided that in view of all the facts of this case, it would not punish the defendant for contempt for a breach of the injunction, and discharged the rule, and complainant's attorney excepted.

A. W. HAMMOND and SON, R. F. LYONS, for plaintiff in error.

L. J. GLENN and SON, for defendant in error.

WALKER, J.

1. There is no question as to the power of a Court of Equity to enforce obedience to its orders by attachment. Code, sections 200, 3157, 4125, and 4127. The question here is, do the facts make such a case as to require this Court to control the discretion of the Court below.

2. It has been often decided that the action of the Superior Courts in granting or refusing injunctions will not be controlled, except when it may appear there has been a flagrant abuse of discretion. The same rule should apply to the action of the Courts relative to the punishment of parties alleged to be contumacious. Whether a contempt of Court

has been committed which should be punished, may generally be safely left to the discretion of the circuit Judges. They are not likely to fail in enforcing due respect to their orders; and their action in such cases should be final, unless there is something in the decision to show a most flagrant abuse of the discretion. *Cabot vs. Yarborough*, 27 Ga. R. 476. Especially should this Court be slow to control that discretion, where the circuit Judge has declined to punish the party. We are satisfied that we may safely leave to the circuit Judges, the infliction of such punishment as may be necessary to enforce obedience to their orders, and vindicate the authority and dignity of their Courts.

3. Without contesting this position, the plaintiff insists that his case comes under a different rule, that his motion is not made simply to vindicate the authority of the Court, but for the purpose of protecting his rights, that here the attachment sought is remedial, not to punish for an act done in contempt of the Court, but to compel the doing of an act necessary to the administration of justice. *Cobb vs. Black*, 34 Ga. R. 162. We recognize the distinction here drawn, and in a proper case, are ready to enforce the rule for which the plaintiff contends.

4. In this case, the defendant was enjoined from using or selling the property in litigation. This injunction, the plaintiff alleges, has been violated by defendant. Suppose the Court had "committed defendant for said contempt," would this afford any remedy to Howard? Would it restore the property sold? Do not the facts show that the only effect of the punishment, would be to vindicate the authority of the Court, and not furnish any remedy for the plaintiff? We think so. Hence the question was one for the discretion of the Court below. If this were a remedial proceeding, to which the plaintiff is entitled for the enforcement of his rights, then we would control the discretion of the Court below, and award to the party that relief to which, under the facts and the law, he would be entitled.

5. When the plaintiff made his application to a Court of equity, he showed such facts as entitled him to the aid of its

extraordinary powers. That Court laid its strong hand upon Durand, and would have preserved the property and protected Howard from all injury arising from the interference with it by Durand, had it not been for the subsequent conduct of Howard himself. Howard took upon himself the control and management of the business for which he had previously invoked the aid of the Court, and consented to a violation of the injunction granted at his instance. This being so, he must suffer the consequences. He cannot subsequently have the other party punished for a breach of the injunction, when that breach was by his consent. *Mills vs. Cobby*, 1 Meriv. R. 3; 3 Dan. Ch. Pr. 374. These parties entered into a new contract, by which the injunction was in effect dissolved; and because defendant failed, as it is alleged, to comply with this contract, the Court is asked to punish him for the violation of the injunction previously granted. As evidence of the view that complainant took of his rights, we may refer to the fact that he sued on the obligation to recover the damages, to which he says he is entitled on account of Durand's failure to comply with the contract. This shows that complainant thought he had made a new contract, and if that contract had been carried out, was not the bill at an end without anything further to be done? If so, can it be pretended that the injunction was vital all the while?

6. A Court of equity will not lend its punitive powers to one party, for the purpose of coercing the opposite party into the making of new stipulations to which he had never agreed; nor, under pretence of punishing for a breach of an injunction, will it attempt to enforce a contract made subsequent to the granting of the injunction.

7. Equity will enforce the rights of the parties according to the rules and practice of the Court; and parties who invoke its aid, should not, by contract, thwart its proceedings and render nugatory its processes. Should they do so, they ought not to expect to be relieved from the consequences of their own interference.

Judge Harris, while he agrees in asserting the legal propositions here maintained, thinks the facts are not such as to

make them applicable. He thinks the judgment should be reversed, and an attachment awarded.

Judgment affirmed.

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HARRIS, J., dissenting.

I do not concur in the judgment rendered in this case by the majority of the Court. The decision has been made, I think, upon an entire misapprehension of the facts. There is not one of them from which the *assent*, either positively or impliedly, of Howard can be inferred, to the violation of the injunction by Durand. This injunction had reference entirely to Howard's interest as a copartner. The negotiation begun afterwards by Durand, had not the slightest reference to the matters involved in Howard's bill, but was *an offer by Durand to sell to Howard his (Durand's) share in the partnership*. It fell through by the bad faith of Durand. Had this negotiation had any connection with Howard's interest as a partner, broken off as it was, by Durand's non-compliance with his agreement to sell, Howard ought not to be permitted to suffer any injury thereby; but surely when the negotiation had not the slightest relation whatever to the matters in controversy under Howard's bill, there can be no plausible reason assigned for not allowing him the benefit of an attachment for contempt, to coerce Durand to make good any damages he may have sustained,—not beyond the penalty of the injunction.

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Field, adm'r, vs. Leak.

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E. E. FIELD, administrator of ELIJAH M. FIELD, deceased, plaintiff in error, vs. JOHN F. LEAK and WM. W. LEAK, makers, and HENRY P. FARROW, endorser, defendants in error.

NOTE.—WARNER, C. J., did not preside in this case.

New trial granted because the verdict is decidedly and strongly against the weight of evidence.

Assumpsit. Scaling Ordinance. Tried before Judge MILNER. Bartow Superior Court. March Term, 1867.

This action was founded on three promissory notes, as follows :

“On or before the first day of September next, we, or either of us, promise to pay Henry P. Farrow, or bearer, the sum of seventeen hundred and fifty (\$1750 00) with interest from date for value received. Witness our hands and seals, this the 5th day of September, 1861.

A. J. MILNER.

J. F. LEAK, [L. s.]

W. W. LEAK, [L. s.]”

This note had on it receipts signed by Farrow for \$95 00, Sept. 14th, 1861; \$475 00, Oct. 22d, 1861; \$29 50, Nov. 15th, 1861 :

“On or before the first day of January, 1864, we, or either of us, promise to pay Henry P. Farrow, or bearer, the sum of two thousand dollars (\$2000 00) for value received, with interest from date. Witness our hands and seals, this the 5th Sept., 1861, the interest to be paid annually, and if not paid, to become principal.

J. F. LEAK, [L. s.]

W. W. LEAK, [L. s.]

A. J. MILNER. I sign this note as gurantor.”

The third note was exactly like the second, except that it became due “on or before the 1st day of January,” 1865. All of these notes were endorsed by H. P. Farrow.

The defendants plead the general issue and that said notes had been paid and discharged because they were intended to

be paid in Confederate States Treasury Notes, and such Treasury Notes were tendered in payment at the maturity of each of said notes.

On the trial plaintiff introduced said notes and closed.

The defendants then offered as a witness said Farrow.

Plaintiff objected to his testifying on the ground of incompetency, because the endorsee of the notes sued on was dead. This objection was overruled.

FARROW then testified that on the fifth day of September, 1861, he sold to John F. Leak a tract of land near Cartersville, Ga., containing one hundred and fifty, or one hundred and sixty acres, and also the crop on the land, and some mules, cows, wagon, hack and household furniture, and took therefor said notes; that at the time of the sale he estimated the land at four thousand dollars, and considered the other property worth (\$1750.00) seventeen hundred and fifty dollars, that there was no distinct contract as to any part of the property, but the whole was sold for the amount set out in the notes, that in 1858 witness bought the land and gave therefor forty<sup>2</sup> five hundred dollars, (\$4500.00) and thought that the land was worth what he gave for it, and that purchase was made on a gold basis; that in the spring of 1862, he sold said notes to E. M. Field, and took therefor Confederate money and endorsed the notes.

Attorneys for plaintiff objected to proof of what kind of currency Farrow took in payment for said notes. The Court overruled this objection, admitting it, he says, "as a fact which the jury might consider only in arriving at the intention of the parties as to the currency in which the notes were to be paid.

FARROW further testified, that nothing was said at the time of the sale as to the currency in which said notes were to be paid, the money then in circulation was bank bills, he expected to take currency in payment of the notes, that it was expected that there would be a war currency, and it was the expectation and intention of the parties that the notes should be paid in currency in circulation at the time the notes should fall due. Witness thought some Confederate money was in circula-

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tion at the date of the notes and it was then about equal to gold. Witness would not have taken the amount set out in the notes for the property sold, in a currency worth only forty for one, or twenty for one; the credit on one of the notes were given for the property received of J. F. Leak, being some of the property sold by witness to said Leak; no money was paid to witness on either note.

The defendants then read in evidence the answers of Moses A. Leak to interrogatories. He testified that he knew that such notes as those sued on, were given; witness, as agent for J. F. Leak, tendered Confederate money to said E. M. Field, and such tender was intended as a payment for said notes; the tender was made in Marietta, Ga., in the fall of 1863, for the notes then due, but he did not remember how many of said notes were then due; he proposed then to pay all that was then due. In the summer of 1864, just before the falling back of the Confederate army, witness made a tender of Confederate money, proposing to pay off all the notes that were then due from J. F. Leak to E. M. Field; this second tender was made in Atlanta, Ga. Witness heard E. M. Field admit that J. F. Leak had made him a tender of Confederate money as a payment for the first of said notes. E. M. Field admitted to the witness that his brother, J. F. Leak, had made a tender of Confederate money for the first note, and he (Field) refused to take it, and told witness that he was sorry that J. F. Leak had become offended at him for refusing to take the money, as he (Field) had learned. Witness' brother, J. F. Leak, observing to Field that he was and had been in the army all the while, Field observed that he was in the army also, and J. F. Leak replied that Field was in a State shoe-shop, while he (Leak) was in the front, and did not know when he might be killed, and that he desired to pay off those notes as they became due, that his family might not be encumbered with them in the event of his death.

In answer to the cross-interrogatories, the witness said, as to the consideration of the notes, all that his brother, J. F. Leak bought from Henry P. Farrow was summed up together and divided into annual payments, including land and other

property, the land is in Bartow county, 4th district, 3d section, on the road from Cartersville to Cassville, two and a half miles from Cartersville, adjoining lands of Willis Benham, Dr. Leeland and others, near the Western and Atlantic Railroad. The property purchased from Farrow by J. F. Leak, consisted of land, some stock and some furniture. The witness does not recollect the precise number of acres of land—between one and two hundred acres. Witness has no recollection of any corn in the purchase, but he recollects two mules, one horse, one hack and three milch cows were in it. J. F. Leak resides on and exercises control over the land. Witness tendered all that was due at the time each tender was made; E. M. Field refused to receive the money. Witness specified neither the amount due nor that tendered at the time of the tender, though he was asked to state the amounts. The precise date of the tenders not recollected; the first was in fall of 1863, and second in summer of 1864. It was at the time of the tender that Field repeated the conversations aforesaid. Witness is twin-brother of J. F. Leak.

JOHN F. LEAK was offered as a witness for defendants, and was objected on the same ground for which Farrow was objected to. The Court overruled the objection.

He then testified he expected and intended to pay the notes in whatever was the currency of the country, but nothing was said as to what currency the notes were to be paid in.

WILLIAM W. LEAK was then examined and swore that nothing was said as to what currency was to be paid, but he expected they were to be paid in whatever might be the currency of the country; that a war currency was expected at the time the notes were given, and the expectation and intention of the parties was that the notes would be paid in that currency, and that he would not have signed the notes if he had not believed at the time the notes were given, that the war currency would be taken in payment when the notes were due. The witness thought the price promised for the property was more than it was worth. On the 1st of September, 1862, Confederate money was two for one; on the 1st



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of January, 1864, it was twenty for one, and on the 1st of January, 1865, it was fifty for one.

L. M. MUNFORD was then introduced and testified that he was acquainted with the land sold by Farrow to Leak. About the time of the sale, the land was worth fifteen or sixteen dollars per acre, and is now worth seven or eight or ten dollars per acre.

Defendant closed.

Plaintiff in rebuttal, introduced JOHN A. ERWIN, who testified that on the 5th of September, 1861, he knew of no Confederate money in circulation; bank-bills were then the currency of the country, and continued to be so until some time in 1862. According to the Broker's table, Confederate money, on the 5th of September, 1861, was ten per cent. discount, and was so from July to October, 1861; the first Confederate money witness knew to be in circulation, was about the last of 1861, or the first of 1862.

Plaintiff also examined C. DODD, whose evidence was that he went to Richmond about three or four weeks after the first battle of Manasses, and found a little Confederate money in circulation. In this region of the country bank-bills continued to be the currency of the country till late in the spring of 1862. Bank-bills depreciated greatly during the war, and are now worth very little—some five, some ten, some twenty cents in the dollar, and some more.

The plaintiff then introduced J. A. HOWARD, who testified that said land, at the date of the notes, was worth about thirty dollars per acre, and was now worth about twenty-five to thirty dollars per acre; that some time ago J. F. Leak asked thirty dollars per acre for it, and spoke of its having a valuable slate mine on it; that the land is worn and not worth as much as when Anthony Caldwell lived on it.

J. A. W. JOHNSON testified on behalf of the plaintiff that on the 5th of September, 1861, no Confederate money was circulating here; the first he saw was in latter part of 1861, or first part of 1862; as an officer of the army he was paid off in April, 1862, at Savannah, Ga., in the bills of the Marine Bank of Georgia; witness was on the coast in the latter part

of 1861 and the first part of 1862, and thinks he was in this county in the latter part of 1861.

The plaintiff also examined J. W. PRITCHETT, who testified that in the fall of 1866 he was a land agent, and as such, was employed by Leak to sell said land for him, and was instructed to ask forty dollars per acre for it, and was not authorized to take less for it. Witness did not think it was worth so much. Leak spoke of a slate mine on it as an inducement to purchasers, but no special importance was attached to it. Witness went with two or three parties with a view of selling the land, and did not succeed in selling it.

The plaintiff rested his case here.

The defendants in surrebutter, examined T. W. DODD, who testified that on the 10th September, 1862, he was paid off in Confederate money at Richmond, Virginia; on the 10th November, 1861, he came to this county, and Confederate money was regarded as a curiosity. At the time witness was paid off he could go to the Brokers in Richmond, Virginia, and get for a five dollar bill (Confederate money) three dollars in specie and two dollars in the Brokers' shin-plasters, which continued to circulate about as Confederate money.

The evidence being closed and argument had, the Judge charged the jury that while the testimony as to tender might not prove a legal tender according to the rule laid down by the Court, yet the jury might consider the testimony as to the tender in adjusting the equities between the parties; that the evidence of Farrow as to selling said notes for Confederate currency, could only be considered by the jury in arriving at the intention of the parties at the time the notes were made as to the kind of currency in which they were to be paid; that Farrow had a right to dispose of the notes as he pleased, and the defendants could not claim anything by it.

The verdict was for one thousand and twenty-five dollars and sixty-six cents, (\$1,025.66) with costs of suit.

The plaintiff moved for a new trial on the grounds:

1st. Because the verdict was contrary to the charge of the Court, to the law, to the principles of equity and justice, and strongly and decidedly against the weight of the evidence.

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2d. Because the Court allowed H. P. Farrow and J. F. Leak to testify.

3d. Because H. P. Farrow was permitted to testify that he sold said notes for Confederate money, and that he expected to take currency in payment for the notes, and J. F. and W. Leak were permitted to testify that they expected to pay the notes in whatever might be the currency in the country over plaintiff's objection thereto.

4th. Because the Court erred in charging as aforesaid as to the tender.

5th. Because after the jury had been charged and had retired to consider their verdict, and before they had found their verdict, one of them (W. F. Weems) separated from the jury and applied to J. R. Parrott, Esq., one of defendants' attorneys, for a schedule of the prices of gold and Confederate money, and got the same from said Parrott.

This last ground was accompanied by the affidavits of said W. F. Weems and C. B. Conyers, two of the special jury, who substantially swore that the jury had agreed to give the value of the Confederate money at the maturity of the notes, and as Mr. Erwin had held a schedule in his hand and testified by it, the schedule was sent for only to assure them in their recollection of Erwin's valuations, and that nothing was said but asking for the schedule, and the verdict was not influenced by it, except in assuring the jury that they properly recollected the testimony of Erwin.

The Court refused to grant a new trial, and upon the grounds aforesaid said refusal is assigned as error.

SAMUEL WEILL, GEO. N. LESTER, for plaintiff in error.

WOFFORD & PARROTT, for defendants in error.

WALKER, J.

We have repeatedly said that by the ordinance "to adjust the equities between parties," more than the ordinary discretion is delegated to juries, and their finding should be respected, except in cases where manifest wrong has been done. To this ruling we still adhere; but this case comes within the exception.

The plaintiff occupies the position that Farrow formerly did. Farrow sold and Leak purchased about five thousand dollars worth of property, on the 5th of September, 1861; and by the contract Leak was to pay to Farrow, or bearer, that sum with interest, payable annually. The property, at the time of the sale, was worth in gold well nigh the sum promised for it. Five years and six months after the trade, the jury found a verdict for one-fifth of the original sum promised to be paid, without interest, and in a currency worth but three-fourths of what currency was worth at the time of the trade! Can any one seriously contend that this is a verdict rendered on principles of equity and justice?

There were scarcely any Confederate notes in circulation at the time the contract was made; and those few were about as good as gold. Farrow swears he would not have sold his property for such currency as the jury found the notes payable in. Not a word was said by any of the contracting parties at the time, as to what sort of currency the notes should be paid in, except what they said in the notes—the best evidence of what the contract was. In the notes the word "dollars" is used, which, according to Mr. Webster, means "silver coin," each "of the value of one hundred cents." Shall the Court and jury interpolate into this contract the words, "Confederate notes," because the parties expected that there would be a war currency, and the notes would be payable in such currency? Was there any such contract? We are not able to find any evidence of it in the record.

If there be then no evidence that the notes were payable in "Confederate notes," is there any other ground on which this verdict can be sustained? Has the property so depreciated

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Field, adm'r, vs. Leak.

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by the events of the war, as to make, upon equitable principles, this verdict right, supposing the jury to have authority to adjust the equities on this basis? There is not a single witness who testifies that the land, without counting the personal property, was worth, at the time of the trial, less than the amount of the verdict; and the weight of the evidence shows it was then worth two or three times as much as the amount the jury found. Upon no hypothesis, under the facts of this case, can this verdict be sustained. We feel loth to control the verdict of a jury, under this ordinance, but we are sure that it is our duty to do so in this case.

We are aware of the difficulties in the way of laying down general rules by which to govern the great variety of cases which may arise under this ordinance. Judge Harris thinks that we should do so; and that the value of the consideration received, at the time of the trade, should be the criterion by which to adjust the equities between the parties. The other members of the Court do not think it best to adopt this as a rule applicable to all cases. In some cases it may be the correct rule; in others it might work great injustice. Let the Courts and juries carry out the provisions of the ordinance in its spirit, and they will find this Court ready to affirm their verdicts and judgments. But when a case, showing such manifest wrong as this exhibits, shall be brought before us, we will unhesitatingly reverse the judgment and award a new trial.

Judge Harris thinks a new trial should be granted on the ground numbered "5" in the Reporter's statement of facts. As we grant a new trial on the merits, perhaps it is unnecessary to pass formally upon this ground.

Judgment reversed.

JOHN W. LEWIS, Superintendent of Western and Atlantic Railroad Company, plaintiff in error, vs. SUSAN WHIDBEE, defendant in error.

NOTE.—WARNER, C. J., did not preside in this case.

A charge not warranted by the facts should not be given to the jury.

Case. In Fulton Superior Court. Tried before Judge WARNER, April Term, 1867.

On or about the 17th July 1857, the slave of Mrs. Whidbee was killed at Marietta, by the cars of the Western and Atlantic Railroad, and she brought her action to recover damages therefor.

The testimony on her part was as follows :

HUGH BUCHANAN, in answer to interrogatories, stated : There was a freight train at the depot when I went up, and a negro man on the right hand side, as you go towards Atlanta; the negro had a wagon loaded with sand, pulled by two mules ; he was at or near the crossing of the railroad, below, or in the direction of Atlanta from the Fletcher House ; the mules' heads were toward the railroad ; the crossing, when I first saw the negro, was obstructed by the freight train, or the engine of the train was very near the crossing, just above it. (" I am inclined to think the latter was the case.")

The negro appeared to be waiting for the train to pass ; the train started towards Atlanta, and passed some distance ; can't say how far below the crossing ; the negro started his team to cross the railroad, and when the team was crossing the railroad the train ran back ; witness thought it ran back very fast for a backing train ; witness thinks the negro saw the train backing about the same time, as he commenced whipping his mules and urging them across the railroad ; just before the train reached the team, the mules ran off the track, and the wagon on it ; the negro jumped off the wagon, on opposite side from the train, and fell across the track ; witness does not think his feet reached or struck the ground first ; he appeared to fall with his side on the track, and a

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Lewis, sup't, vs. Whidbee.

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portion of the freight train passed over him ; can't say whether one or more cars passed over him ; saw some person pull him out on the side of the road ; witness did not go where the negro was ; did not know whether he was killed ; the witness, did not know the negro, nor to whom he belonged ; he was a young negro man, small, rather below medium height, and of dark complexion. Witness knows not whether the crossing was a public street or not.

CROSS-EXAMINED.

He said the negro was waiting to cross when train left ; can't say how long he waited after train passed ; not long, but until the train was some distance below the crossing ; witness thinks the engine and a large part of the train had passed round the curve below the crossing ; don't know the distance nor what time elapsed—not long ; the train started, and was going fast after passing the crossing, and backed (I thought) very fast for a backing train ; it ran back on the sideling ; I do not know how wide the road-bed is ; I think there are two tracks at the crossing ; it may be thirty or forty feet wide ; I do not know how long it would take such a team to cross ; I thought this team moved slowly, even when the negro urged them ; the crossing was down the road as far as the curve, but do not know how far that is.

WILLIAM R. ANDERSON testified that he knew plaintiff's slave Cicero, and that he was killed as aforesaid, stating in substance the same as Buchanan had stated ; witness did not think any signal was given for reversing the train ; it was reversed quickly ; the engineer tried to stop it, but could not.

The train seemed to have started for Atlanta, and he, like the negro, would have concluded that it was gone ; can't say whether the train was running in or out of time ; the crossing was a public street. He describes the negro as Buchanan did ; says he was about twenty years old, and worth about \$1,100.00 when killed. The Western and Atlantic Railroad runs through Marietta and corner of Fulton County.

DANIEL BURKHALTER testified that he knew the negro

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and saw him killed, and described the circumstances in substance as the two witnesses aforesaid. He said the train was moving slowly, was reversed suddenly, that it had passed thirty or forty yards below this public street when the wagon tried to get over, that witness did not hear the signal for reversal given, that the bed of the road is fifteen or twenty feet at the crossing, and the crossing much traveled.

CROSS-EXAMINED.

He said he was about twenty feet from the train, in the street, and saw the train run over the negro.

D. S. ANDERSON testified that the negro was fourteen years old, worth \$1,000.00; he saw him killed by the train; his mules had gotten across, but before his wagon got across the train ran on it; the negro jumped off between the mules, was thrown back, and one wheel of the car ran over him, causing almost instant death; if the negro had jumped to the left instead of the right, he would not have been injured, or had he stayed on the wagon, he would have escaped. It was on the main track, witness thinks.

The negro could have seen the train backing, but got too far on the track to escape, except by jumping to the left; witness thinks the train was pulled up to start for Atlanta, but was reversed to prevent a collision with train coming from Atlanta; it had hardly left the crossing before it commenced backing. The switch is from seven to ten steps from the crossing; the negro started across before the train commenced backing; the man on the engine could not have seen the boy, owing to the curve in the road.

CROSS-EXAMINED.

The crossing was a public one, used every day; the train had about ten cars; the hind one had hardly passed when negro tried to cross; the engine did not get out of witness' sight; train came back at usual speed of trains when backing from distance it went; engineers usually give a signal



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when reversing an engine ; there was another train coming, and this caused the reversal, witness thinks.

Here plaintiff's case was rested.

Defendant introduced JOHN BAMROTT, who testified that he knew the boy ; that he was killed by defendant's cars in 1857, in the spring, he thought ; that he was plaintiff's property, and worth \$1,000.00 ; the train of cars was switching back and forth ; the boy was apparently waiting the movement of the train ; as soon as the train passed, he moved his team to cross ; the engine was reversed, ran back, and the boy was killed before he could possibly get off the track ; the boy's conduct was quiet and orderly ; he was ten or fifteen steps from the track, and could have seen the train backing ; he commenced crossing when it commenced backing ; thinks last car in train had passed crossing from five to twenty steps before it backed ; switch not over ten feet from crossing ; don't think engineer could have seen the boy if his train was a long one, because of a curve in the road ; witness was on the platform in front of his hotel, about five steps from railroad track, and about fifty steps from the boy when he was killed ; the boy waited ten or twenty minutes ; was crossing towards public square ; don't recollect whether the usual reversing signal was given ; the train came back slowly, but can't give its exact speed.

W. J. SCOTT testified as to the killing in substance as the others ; he said the train came backs slowly ; it did not whistle when it started back ; slave was twenty-two or three years old, and worth \$1,200.00 ; witness was about forty yards from where the boy was killed, and thinks engineer could have seen him ; don't know why the train backed, nor whether it was to avoid collision ; trains frequently meet and pass there, and the crossing is a very public one ; thought the boy took a risk in trying to cross, but has seen others do so without injury.

COLEY BEAVERS testified that he saw the boy killed ; witness was fireman on the engine of the train that killed him ; it was a freight train coming to Atlanta, and was due at Marietta a little before the up freight train ; the freight trains

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passed at Marietta, and this train arrived there ahead of the up train ; his train stopped at Marietta and unloaded way-freight, and then pulled out to shift off and leave some cars, and to take on others ; the hindmost car had hardly left the crossing where the boy was standing with his wagon, before he attempted to cross ; witness heard the man at the switch halloo to the boy not to come on the railroad, that he would be killed by the cars ; witness was about midway on the tender on look-out, and saw the boy, or his mules, on the road, and hallooed to the engineer that he would run over the boy ; the engineer reversed the engine, throwing her forward so as to prevent a collision with the wagon and mules and boy, and put on all steam, but could not stop in time ; it was moving on down grade at the time ; the engine was reversed suddenly, and ran back for fear of a collision with a train coming up from Atlanta ; on account of curve and situation of train and engine, engineer could not see the boy when he started to cross ; the train had not started to Atlanta, but was switching as aforesaid ; it had hardly passed before boy tried to cross ; witness is now, and has for many years, been employed for defendant.

#### CROSS-EXAMINED.

Our train not very long, eight or ten cars ; witness not over two hundred feet from boy when killed ; the reversal was to avoid collision with up train ; his train was a little out of time ; train from Atlanta was in time ; the train went back on same track it started out on ; it was down grade, and so the backing train went back fast.

The defendant's counsel requested the Court to charge the jury as follows : That if the plaintiff and defendant are both found to be negligent, and the plaintiff could have avoided the effects of defendant's negligence in the use of ordinary diligence, and did not, then the defendant is not liable.

The Court refused so to charge, but charged as follows :

If defendant was exclusively at fault, plaintiff is entitled to recover. If the plaintiff is exclusively at fault, she is not

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entitled to recover. If both parties were at fault, the plaintiff may recover, but the damages shall be diminished by the jury in proportion to the amount of default attributable to her.

To which refusal to charge defendant excepted.

The jury found for the plaintiff \$1,200 damages with costs. Counsel for defendant, during the term, moved for a new trial, because of the refusal to charge as aforesaid, and because the verdict is contrary to evidence and the weight of evidence, and contrary to law.

The Court refused a new trial, and this is assigned as error.

S. B. HOYT, represented by N. J. HAMMOND, for plaintiff in error.

JOHN COLLIER, by JOSEPH E. BROWN, for defendant in error.

WALKER, J.

The Court below was satisfied with this third verdict, concurring almost precisely with its two predecessors. We are satisfied that it is not too large; it might well have been larger. The great weight of the testimony shows that the negro was not at all at fault; and we apprehend the jury failed to increase the verdict by adding interest as damages in consequence of the charge given on the subject of both parties being at fault. If the charge asked had been given, and the jury in consequence thereof had found for defendant, the verdict should have been set aside. Such being the case, should a charge have been given the tendency of which was to produce a verdict that could not be permitted to stand? Would it not, in legal contemplation, be a charge not applicable to the facts of the case? We think so, and therefore the Court did right to refuse to give it. Though there may be some slight evidence in favor of a hypothesis, but not

sufficient to uphold a verdict, should that hypothesis be submitted to the jury? For what purpose; to what good end? The only effect it could have would be to lead the jury into error.

Judgment affirmed.

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JOHN T. BROWN, plaintiff in error, vs. THE SOUTH-WESTERN RAILROAD COMPANY, defendant in error.

THE SOUTH-WESTERN RAILROAD COMPANY, plaintiff in error, vs. JOHN T. BROWN, defendant in error.

NOTE. WARNER, C. J., did not preside in these cases.

1. If a Railroad Company carry off a slave without the written permission of the owner, overseer or employer, though the slave be in company with a thief who had stolen him, the Company will be liable.
2. Where the owner reclaims his slave, carried off under such circumstances as above stated, the measure of damages is not only the hire of the slave for the time he was absent, with interest added, but in addition thereto, such reasonable and necessary expenses as he may have incurred in reclaiming the slave.
3. The cause of action in this case having occurred before the Code went into effect, the plaintiff is not entitled to double the damages sustained, as provided for by section 2982 of the Code.

Case. Tried before Judge VASON. Sumter Superior Court. April Term, 1867.

This was an action of trespass on the case for carrying away on the cars of said Company, Brown's slave without Brown's consent. The plaintiff claimed hire, and expenses incurred in restoring said slave to his possession. The two bills of exceptions state the facts differently in some particu-

lars, but agree in all that is material to an understanding of the opinion of the Court.

Plaintiff's slave was a valuable painter, worth for hire three dollars per day, was carried from Albany to Macon, Georgia, on defendant's cars, without permission or consent of Brown; he stayed away about six weeks; Brown went in pursuit as far as Macon; sent telegraphic dispatches to various points, and sent one Atkinson to Memphis for the slave, who paid his jail expenses, and brought back the boy and the white man who stole him. All the expenses for railroad fare, dispatches, jail fees, pay to Atkinson, etc., incurred by plaintiff, amounted to two hundred and sixty-two dollars and fifty cents.

Plaintiff's attorneys requested the Court to charge the jury, that on proof of the property in himself, and the taking off on its cars plaintiff's slave without permission or consent of plaintiff, defendant was liable for all damages, including expenses in reclaiming the slave, and that they should find double the actual damages, as provided by the Code.

The defendant's attorneys requested the Court to charge the jury, that although defendant took said slave on board its cars, without a written permission from his owner, overseer or authorized controller, still if he went off in possession of a white man, that man's possession of him was a fact from which defendant might presume that he owned the boy and had a right to carry him away, and that there had been no such negligence as rendered defendant liable.

The Court refused to give either of said requests in charge. He charged that the rule of double damages was not, at the time of carrying the boy away, the law, and therefore did not apply to this case; that the possession of the slave by the white man and his taking him on said cars, did not relieve the defendant; and that the measure of damages was the value of the hire of said slave while he was absent from his master, with interest thereon.

The verdict was for one hundred and fifty-seven dollars and costs.

Each party excepted, and assigns the refusal to charge as requested (by *his* attorneys,) and the charge as given, as error. The cases were consolidated and argued together.

W. A. HAWKINS, for Brown.

JAMES J. SCARBOROUGH, for South-Western Railroad Company.

WALKER, J.

1. The Railroad Company insisted that it was not liable for carrying off plaintiff's slave, because a white man, who had stolen the negro, had possession of him, and the negro was received on the cars upon the idea that he belonged to the thief; that possession of personal property is *prima facie* evidence of title, and in such a case as this, would be such evidence as would relieve the Road from liability, as showing reasonable care and diligence to guard against doing to any one a wrong. A sufficient reply to all this is, that the act of 21st February, 1850, (Cobb, N. D. 399-400,) says, "That if it shall be made to appear that any negro slave shall escape on any railroad car, locomotive or tender, without written permit from the owner, overseer or employer, such owner, overseer or employer may recover by suit, in any court of competent jurisdiction, the amount of the value of said negro, and the amount of all expenses of the suit incurred, from said railroad company." In the absence of a written permit from the owner, overseer or employer, the Road had no right to receive the negro on board its cars, and the Court did right to hold it liable. We therefore affirm the judgment in the bill of exceptions prosecuted by the Railroad Company.

2. We cannot sanction the rule laid down by the Court as to the measure of damages in this case. Plaintiff was entitled to recover as damages, not only for the hire of the slave during the time he was absent, with interest added, but he was also entitled to recover the reasonable and necessary expenses incurred in reclaiming him. What this amount would be, will depend on the facts of the case. Defendant has a

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right to mitigate the damages by showing, that though the slave was carried off in its cars under such circumstances as make it liable, yet as the plaintiff subsequently reclaimed his slave, his actual injury was to that extent diminished. Had the Road reclaimed the negro and delivered him to his master, then the rule laid down by the Court would have been correct; but as it did not do so, and the recovery was due to the efforts of the master, it is right that the Road should pay the reasonable and necessary expenses incurred in securing and returning the negro.

3. The cause of action in this case having occurred before the Code went into effect, the Court did right to charge that plaintiff was not entitled to recover double damages, as provided for by section 2982 of the Code.

Judgment reversed.

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RODERICK RUTLAND, plaintiff in error, vs. THOMAS HATHORN, defendant in error.

NOTE.—WARNER, C. J., did not preside in this case.

1. Upon a petition to establish a copy of a lost promissory note, and issue joined as to the making of the note, the parties are entitled to a trial by a petit jury, with a right to appeal to a special jury.
2. This right may be waived by consent, and the case submitted, in the first instance, to a special jury.
3. If the case be submitted to a special jury, the parties have no right of appeal.
4. In civil cases, it is within the legal discretion of the Court to allow the jury to be polled or not.
5. If the jury, after agreeing upon their verdict, disperse by consent of the parties, the Court is not bound, upon the subsequent return of the verdict, to poll the jury.
6. A juror will not be heard in impeachment of his own verdict.
7. Declarations made by a party in his own favor, to be admissible as part of the *res gestæ*, must be shown by proof to have accompanied the act, or to have been so nearly connected therewith in time, as to be free from all suspicions of after-thought.

8. This Court will not grant a new trial on a mere preponderance of evidence against the verdict, and the charge of the Court, though this Court may differ with the jury as to the preponderance of proof, provided there be sufficient evidence to support the finding, especially when the Circuit Judge refuses to grant a new trial.

Rule to establish note. Polling jury. Tried before Judge SPEER. Monroe Superior Court, February Term, 1867.

Roderick Rutland alleged that he had had a promissory note made by Thomas Hathorn, payable to him, or bearer, for Sixty Dollars, dated 22d June, 1862, and due one day after date, and that said note was lost, and obtained a rule *nisi*, calling on Hathorn to show cause why a copy should not be established. For cause, Hathorn plead that he never executed such note.

At the trial, a special jury was empanelled to try said issue, neither party objecting, and both parties assenting thereto, as the Court understood.

The plaintiff swore that about the date of the note aforesaid, he was at Russelville; the tax receiver and collector and others were there. Witness was at the table attending to some business, when Hathorn asked a loan of \$60, to send to his son, Asbery, in the army. Witness loaned him the money and took his note therefor; afterwards, being very sick, and thinking he would die, he sent for Ben Zellner to write his will; gave Zellner his pocket-book containing most of his notes; Zellner and Rufus Cheney looked through his papers; Zellner took them off and kept them two or three months and brought them back. Witness did not know whether Hathorn's note was in the book or not, as he was very sick. The federal army destroyed his papers except some small notes and certificates. The Hathorn note is lost or destroyed; witness has not seen it since.

Upon cross-examination, he stated that he was certain that he loaned the money at Russelville; James Harrell was present, and he thinks Mr. Blount, the collector and receiver, and others were. Thomas Hathorn always had money, and his asking to borrow, surprised witness; had loaned him \$5



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once before; had a note on him about 1840 or 1841, for \$300, which was paid, \$10 or \$15 at a time, during two or three years. Witness had a note on Thomas J. Hathorn (usually called Jack) for \$50, loaned to buy corn, before the war, and does not think it was paid; he told Cheeves and John Maynard, some year or two ago, that he thought it was paid, or asked them if it was not paid. Maynard was Jack's administrator. He told Monroe Hathorn about it; he (Monroe) tried to make witness believe that it was Jack's note he had had, and not Thomas', but witness told Monroe that he had had a note on Thomas too. He told Monroe he thought Jack's note was paid; things were so torn up he could not recollect well. Zellner took the large pocket-book; Jack's note was in the small one, in which witness usually carried his due notes, and such as he could collect.

Plaintiff closed.

Defendant was sworn. He roundly denied borrowing the money or giving the note, or being at Russelville that year on any public day. He said he had, at that time, plenty of money at home, and in the bank at Forsyth; has never since 1855, had less than \$1,000 on hand; was careful to have no notes out; could not rest when he had a note out till it was paid. The note held in 1840 or 1841 was given to Mixon for a negro; he paid it in small, but frequent payments.

Upon cross-examination he stated that he did not recollect being at Russelville in 1862; that he did not see Blount or Harrell there. He knows he did not borrow the money; has had no money dealings with plaintiff since he paid the Mixon note; don't recollect when his son died; it was 1861 or 1862.

BEN PYE swore: that defendant always had money; kept deposited with him in bank at Forsyth since 1855-6, sometimes as much as \$1,500; he had money on deposit in 1862; he thinks as much as \$1,000, but could not tell as the books were gone. Defendant is prompt and punctual and witness considers him straight in his dealings, and so is the plaintiff.

CHEEVES sworn, said: that a year or two after Jack Hathorn's death, plaintiff asked him if Jack Hathorn's note had

not been paid, and witness told him Jack's wife said it had not. It was the \$50 note aforesaid. Witness wrote the note; it was for borrowed money.

MONROE HATHORN swore: that hearing of the difficulty between plaintiff and his father, he tried to convince plaintiff that he had mistaken Jack's note for his father's, but plaintiff said he had a note on father too.

It was admitted that Maynard, the administrator of Jack Hathorn, never paid the \$50 note.

Defendant closed, and plaintiff in rebuttal examined BEN ZELLNER, who substantially states what plaintiff did as to his and Cheney's visit to plaintiff in 1864, when plaintiff was sick. There were many valuable notes in the pocket-book, among them one on defendant; recollects it from the fact that the name signed to it was very hard to make out; could not tell whose it was for some time; had to examine it closely to make out the name; the note was for some amount under \$100; can't recollect whether it was on Thomas or Thomas J. Hathorn; kept the notes two or three months and returned them to plaintiff, who was quite sick then, and off and on feeble since.

JAMES HARVELL testified that he was at Russelville in the summer of 1862, when the tax collector and receiver was there, and other persons also; it was on a public day; saw plaintiff and defendant there; went to the table where they were, and saw plaintiff hand defendant some bills; don't know how much; there were four or five of them; they were new and attracted witness' attention; very soon after—perhaps a minute after—he walked away and left them; don't recollect seeing a note given; recollects seeing Henry Gregory there.

HENRY GREGORY sworn, said: he was at Russelville in 1862 on a public day; saw Blount, plaintiff and Harvell here; does not recollect to have seen defendant there.

Plaintiff proposed to prove by Gregory that on the day plaintiff loaned the money at Russelville as aforesaid, as he was starting home, he met the witness and said to him: "There goes Thomas Hathorn, to whom I have just loaned \$60, and I am surprised that he should be borrowing money." Defend-

ant objected, and the objection was sustained by the Court. In the agreed brief of evidence is the following: "The affidavit of defendant to his plea was before the jury, and his signature very badly written and hard to be made out. The plaintiff and defendant both are men of advanced age."

The evidence being closed, the Court charged the jury that when the testimony of witnesses is conflicting, they should reconcile it if possible, but if it cannot be done, then they should find according to the preponderance of evidence.

By consent, it was agreed that the jury, after finding a verdict, might disperse, and render it in Court next morning. When the verdict was about to be delivered, plaintiff's attorney requested leave to poll the jury, which was refused. The verdict was for defendant. A new trial was moved for: because the verdict was contrary to the law and evidence, and the principles of justice and equity, etc., and against the charge of the Court: because the Court erred in rejecting the testimony of Henry Gregory as aforesaid: because the Court erred in not allowing the jury to be polled: because the verdict was not unanimous, and because it was error to try said case before a special jury.

In support of this motion, plaintiff read the affidavit of Jesse Aycock to the effect, that he did not believe the verdict was right, that he and three others of the jury disagreed to it, but rather than make a mistrial, submitted to the majority, and further, that on account of his health and advanced age, he was unable to stay in the jury room and contest the verdict, and therefore consented, though then and yet he thought it wrong.

The Court refused a new trial, and for that plaintiff in error seeks a reversal.

CABANISS & PEEPLES, A. D. HAMMOND, for plaintiff in error.

R. P. TRIPPE, for defendant in error.

WALKER, J.

This is an unfortunate controversy about a small matter between two old men, neighbors, of good character, and who have got into this trouble owing to the confusion incident to the war. Both are equally honest in this matter, doubtless, but owing to the excitement of the times, and the frailty of memory, a misunderstanding has arisen, which it is very difficult, if not impossible to adjust satisfactorily. In this state of uncertainty, we are disposed to leave the case where the Court below left it. The jury having decided the question upon the evidence, which is admitted to be conflicting, and the Court having declined to grant a new trial, and there having been no error in law committed by the Judge, we think it best for both litigants that there should be an end to this lawsuit.

1. The parties were entitled to have this case submitted first to a petit jury, from whose finding, either could have entered an appeal. *Taylor vs. Holland*, 20 Ga. Rep., 11.

2. This right may be waived, however, by consent, as is done almost daily, and the case transferred from the common-law to the appeal docket, without trial at common-law before a petit jury.

3. In this case the issue was submitted to a special jury, not only without objection, but "both parties assenting thereto, as understood by the Court." It may be possible that it did not occur to the learned counsel, at the moment, that the parties were entitled to a trial before a petit jury; though the familiarity with the decisions of this Court ever manifested where these counsel appear before us, would go far to rebut this idea; or it may be that both parties being ready, wished, by a single trial, to end an unfortunate litigation between neighbors, and therefore intentionally went before a special, in preference to a petit jury; which latter, from our knowledge of the counsel and the facts of the case, we are disposed to adopt as the true hypothesis. Be this as it may, the

parties having, without objection, gone to trial before a special jury, in the first instance, they must be held to have waived their right to a trial before a petit jury, and as a consequence their right to appeal, and must be bound by a decision made by the tribunal of their own selection.

4 and 5. It was agreed by the parties that the jury, after agreeing might disperse, and return their verdict next morning. When the verdict was returned into Court next morning, plaintiff's counsel asked leave to poll the jury, which was refused by the Court, and this is alleged as error. In *Smith et al. vs. Mitchell*, 6 Ga. Rep., 465, this Court says: "It is our judgment, that in civil cases it is discretionary with the presiding Judge to poll the jury or not. It is proper, however, to say that the jury ought to be polled, whenever there is any good reason to believe, no matter how the fact is manifested, that any one of the jury has not agreed to the verdict." "The motion to poll the jury was properly refused, because the jury had dispersed before it was made. We are clear that the only safe general rule is to deny the application in all such cases;" p. 486. This fully sustains the ruling of the Court below.

6. A new trial was moved on the ground, also, that the verdict was not unanimous. In support of this ground, the only evidence was the affidavit of one of the jurymen. It would seem that some questions cannot be considered as settled by judicial decision. In *Coleman vs. The State*, 28 Ga. Rep., 84, this Court says: "the affidavit of a juror, made after the rendition of his verdict, is not admissible to impeach the verdict. *This is well settled.*" See also, *Brown vs. The State*, *Ib.* 217. *McElvin vs. The State*, 30 Ga. Rep. 869.

7. Should the Court have admitted the testimony of Henry Gregory? It was argued that this testimony was admissible as part of the *res gestae*. Our Code, Section 3696, says:— "Declarations accompanying an act, or so nearly connected therewith in time, as to be free from all suspicions of device or after-thought, are admissible in evidence as part of *res gestae*." How nearly connected in time was the statement made by plaintiff to the principal fact, the alleged loaning of

the money? It was on the same day it seems, at the same place, as plaintiff was starting home. But how long did it occur after the alleged loaning of the money? Gregory did not recollect seeing defendant there at all, though a portion of the proposed testimony was: "there goes Thomas Hathorn," and would seem to imply that defendant was at the time within the sight of the witness. Mr. Greenleaf says the declarations "must be concomitant with the principal act, and so connected with it as to be regarded as the mere result and consequence of the coexisting motives, in order to form a proper criterion for directing the judgment which is to be formed upon the whole conduct." 1 Greenleaf, Ev. Sec. 110. The evidence proposed was not shown to accompany the act, was not concomitant with it, nor sufficiently near in time to be admissible as part of the *res gestæ*. It may have occurred in a short time after the principal act, or it may have been one, two, five, or even ten hours afterwards.

8. Should a new trial be granted because the verdict is against the evidence and the charge of the Court? In *Doe ex dem. Hanby et al., vs Roe cas. ej., and Tucker tenant*, 28 Ga. Rep., 485, this Court says: "We think the verdict contrary to the weight of evidence in this case; but not so strongly and decidedly so, as to authorize a new trial, especially when it has been refused by the Circuit Judge who presided on the trial of the cause." In *Diomatari vs. Choate et al.*, Ib. 320, this Court holds that: "Notwithstanding the Court may differ with the jury as to the preponderance of the proof, yet the verdict will not be disturbed upon a naked question of fact, provided there be sufficient evidence to support the finding; especially where the Circuit Judge is satisfied, and refuses to grant a new trial." See also, *Smith vs. Smith*, 29 Ga. Rep., 365. These authorities are conclusive in this case. There is positive testimony here on both sides, and it is difficult to determine in favor of which side it preponderates. It seems to be pretty well balanced, and is just such a case as can be better decided by a Court and jury of the vicinage, than by this Court, upon a mere written statement of what occurred on the trial. Upon the whole, we think the

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law has been fairly administered in this case, and that it is better for the parties that this litigation be ended.

Judgment affirmed.

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THE STATE OF TENNESSEE, plaintiff in error, vs. J. S. VIRGIN, administrator of T. CHERRY, deceased, defendant in error.

NOTE.—WARTER, C. J., did not preside in this case.

1. At common-law, a judgment twenty years old is presumed to be paid.
2. Plaintiff declared on a judgment rendered in favor of the State, in the State of Tennessee in 1838, to which the defendant pleaded the statute of limitations. The Court sustained the plea, and decided that the plaintiff could not recover. Held that the Court decided right.

Debt on Judgment. Statute of Limitations. Motion for New Trial. Tried before Judge COLE. Bibb. Superior Court. November Term, 1866.

At the trial, plaintiff introduced in evidence a judgment in favor of the State of Tennessee, against one Thomas Cherry, who was admitted to be the defendant's intestate, and it was agreed that the statutes of Tennessee should be considered as in evidence. This judgment was dated December Term, 1838.

Defendant introduced no testimony, and relied on the statute of limitations.

The Court charged the jury that the statute of limitations of Georgia, against foreign judgments, was the law of this case. Verdict was rendered for the defendant.

A new trial was moved for because the verdict was contrary to evidence, and because the Court erred in charging as aforesaid.

The Court refused a new trial, and for this, plaintiff in error asks a reversal.

LOCHRANE & BACON, COBB & JACKSON, for plaintiff in error.

W. POE, for defendant in error.

WALKER, J.

In this case, we were entertained with learned and ingenious arguments on the "comity of nations," the application of the doctrines to the relations existing between the several States of this Union; and the reasons why the Courts should enforce these doctrines in cases like the one at bar. It was insisted, too, that the State, unless expressly named, is not included in the provisions of a statute, and that Georgia has adopted the maxim of "*Nullum tempus occurrit regi*," and should apply the same rule in favor of a sister State when she becomes a suitor in our Courts. While it would be pleasant to enter into an extended discussion of the questions raised, yet as the decision of this case renders such discussion unnecessary, I must at present decline to do so. Respect for the able counsel may perhaps require a reference to a few general principles which we recognize. It is true that in *Brinsfield vs. Carter*, 2 Ga. R., 143, this Court decided that, "The statute of limitations does not run against the State;" but it is also true that in March, 1856, pamph. p. 237, an act was passed which provides, "That when, by the provisions of this act, a private person would be barred of his rights, the State shall be barred of her rights under the same circumstances;" and one of the provisions of that act is that "All suits upon judgments obtained out of this State, shall be brought within five years after such judgment shall have been obtained, and not after;" ib. 234. So that in Georgia it would seem that the old common-law maxim of "*Nullum tempus occurrit regi*," has been abrogated.

We concede fully the rule that comity of nations "should always exist between all civilized, independent States, and



more especially between the confederate States of the American Union;" Johnston vs. Riley, 13 Ga. R., 135; Bank of Augusta vs. Earle, 13 Pet. R., 590. But this comity will be enforced only where it "is not contrary to the policy, or prejudicial to the interests of the State," Code sec. 10. The third axiom of Huberus, (Lib. 1. tit. 3, *de conflictu legum*, § 2, p. 538,) is now generally received as properly describing what is meant by "the comity of nations." The maxim is, "that the rulers of every empire from comity admit, that the laws of every people in force within its own limits, ought to have the same force everywhere, so far as they do not prejudices the powers or rights of other governments or their citizens." See Sto. Conf. L., sec. 29. But I forbear to pursue this investigation because, under the view which we take of this case, such discussion is unnecessary.

1. This is an action brought to enforce a judgment more than twenty years old. At common-law, such a judgment is presumed to be paid. Burt vs. Casey, 10 Ga. R., 178.

2. There is no evidence in the case to rebut this presumption; but the plaintiff seeks to avoid the effects of this presumption, as well as the plea of the statute of limitations of our own State, of five years, by invoking the aid of the old maxim, "*Nullum tempus occurrit regi*." Our reply is, that this maxim is not of force in the State of Tennessee, and therefore no "comity" requires the Courts of Georgia to enforce it in favor of Tennessee. By the Code of Tennessee, section 2806, (and the law was substantially the same before the adoption of the Code,) it is provided that "The State shall commence and prosecute suits according to the laws of the land, as in cases between individuals, except that no security (for costs) shall in such case be required." Section 2807 provides that "Actions may be instituted against the State under the same rules and regulations that govern actions between private persons." These provisions place the State upon an equality with her citizens, before her courts, subject to the same rules, restrictions and limitations which apply in cases where citizens alone are parties; and if so, the State is barred by the statute of limitations within the same time and

under the same circumstances, which would bar the remedy of a citizen; and such we understand to be the ruling of her own Supreme Court. The State of Tennessee vs. Crutcher's administrator, 2 Swan's Tenn: Rep., 504, was an action brought by the State against the administrator of one of her public officers, and the claim disallowed on the plea of the statute of limitations. The head note to the case is in these words; "The statutes which limit the time within which suit may be brought against executors and administrators, operate as well against the State as against individual citizens." The opinion was delivered by McKinney, J., and concurred in by Green, J., against Totten, J., dissenting; and among other things, the Court says, "It was argued that '*nulhum tempus occurrit regi*' applies. It might be doubted whether this maxim of regal prerogative was not one of the very things which our ancestors, instead of bringing with them, were most careful to leave behind, as not altogether consistent with the theory of government and jurisprudence maintained and desired to be adopted by them," p. 509. "The act of 1840 says 'That the State of Tennessee shall be and is hereby authorized to commence and prosecute suits for all causes of action accrued or accruing to the State, in all the Courts of the State, according to the laws of the land, as in other cases.' That this statute intended to place the State upon the same footing with other suitors in the Courts, can admit of no doubt; it is so in effect declared in terms. If this be not so, then the words can have no meaning. The claim of right or cause of action sought to be enforced, must be of such a character as, according to the laws of the land, may be enforced in other cases. The remedy and the right of the State on the one hand, are to be regulated and determined according to the law of the land, as in other cases between individual suitors; and so on the other hand, precisely the same rule is to govern, as respects the matters of defence of which the defendant may avail himself. Whatever matter would be a valid defence according to the settled principles of law and modes of procedure in like cases between individuals, will be equally so in suits instituted on behalf of the State, under the act of 1840. The

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express declaration that the suits which the statute authorized to be brought by the State, shall be prosecuted according to the laws of the land *as in other cases*, is comprehensive of everything respecting either the right or the remedy, and it clearly excludes the idea of an intension, that the State as a suitor in the Courts, should be permitted to claim or assert anything in the nature of prerogative or exemption, out of the ordinary course of the law of the land; not admissible in similar controversies between private individual suitors. In this view of the act of 1840, it results that the present action is barred by the statutes of limitations," p. 510-11.

This long quotation is made because it establishes clearly, that according to "the comity of nations," this action cannot be maintained. For if the laws of Tennessee should have the same force in Georgia as they do in that State, this action is barred by the statute of limitations. The "comity of nations" could ask no more than this. Under the laws of Georgia, the judgment is presumed to be paid; and applying the rule which Tennessee lays down for herself in her own Courts, and she is barred by our statute of limitations, which applies to "all suits upon judgments obtained out of this State," and says such suits "shall be brought within five years after such judgment is obtained." Under any view which we can take of this case, the plaintiff is not entitled to recover.

Judgment affirmed.

THOMAS MILAM, plaintiff in error, vs. REBECCA SPROULL,  
defendant in error.

NOTE.—WARRAN, C. J., did not preside in this case.

1. A substantial compliance with section 8967 of the Code, requiring written notice of the sanction of a writ of *certiorari* and the time and place of hearing is sufficient.
2. The object of giving the notice is to enable the party notified to take steps necessary for his defence.
3. *Ex parte* affidavits, taken subsequent to the granting of a *certiorari*, are inadmissible upon the hearing of the case before the Superior Court.
4. There being no evidence that the road in controversy had existed for seven years, the Inferior Court had no authority to declare it a public road without providing compensation to the land owners for the damages thereby sustained.

*Certiorari* from Inferior Court of Bartow County. Decided by Judge MILNER, Chambers.

Certain citizens of Bartow County petitioned the Justices of its Inferior Court that they order "the road leading from near Dr. Thomas Milam's so as to intersect the Cartersville road near Mrs. Burges', (it being an old established road, and used by many citizens as a mill and church road, and recently closed up by Mrs. Rebecca Sproull,)" to be opened.

Thereupon the Justices appointed three reviewers to examine and report upon the same. They reported that the proposed road was practicable and ought to be established, &c. This report was not sworn to.

Without more, on the 26th February, 1866, the Justices of said Court ordered said road opened, and to be kept open, and worked as a public road.

On the 7th March, 1866, Mrs. Rebecca Sproull (and John A. Crawford, as administrator of George W. Underwood,) showed to the said Justices that said road ran through their lands, and moved to set aside said order, because said report was not sworn to; because no notice was posted at the Court House door, nor published in a public gazette, and no notice was given to said land owners, their agents, overseers, or any

one living on said lands, prior to giving said order; and because no provision was made to pay said parties for the damage done them by the opening of said road.

On the same day last aforesaid, upon the petition of Mrs. Sproull and said Crawford, the Clerk of said Court was ordered to summon a jury (for each of them) to assess the damages. Whether this was done before or after said motion was made does not appear.

Said motion was overruled.

Mrs. Sproull filed her petition for *certiorari*, upon the grounds stated in said motion. By consent of counsel, made 15th September, 1866, it was ordered that the *certiorari* be heard and determined on the 26th September, 1866.

Defendant's attorney moved to dismiss the *certiorari*, because no written notice had been given of the time and place of hearing the same ten days before the sitting of the Court to which it was returnable.

Plaintiff's attorney relied upon the following facts as a compliance with the statute requiring such notice: While the Superior Court was in session in March, 1866, the Judge from the bench informed attorney for defendant in *certiorari* that a writ of *certiorari* had been applied for, and said attorney objected to having the same granted, because the exceptions signed by the Inferior Court were not produced, saying he was entitled, as matter of right, to their production, and thereupon the Judge refused to sanction the writ till said exceptions, so signed, were produced. They were produced, and the writ was granted during the term without further notice. Afterwards, at the instance of Mrs. Sproull, an injunction was granted against defendant in *certiorari*, (*et al.*) and served on him the 5th April, 1866. In the bill for injunction was the following statement: "Youratrix, through her counsel, as she is advised and believes, applied to and obtained from your Honor a writ of *certiorari*, directed to the Inferior Court of said county, directing and requiring the Clerk of said Inferior Court to certify and send up all the proceedings in said Court relative to said road, and that in the meantime all other and farther proceedings in said

case relative to said road be stayed. Copies of which writ of *certiorari*, as well as said orders of said Court appointing said reviewers, opening said road, the petition of said Milam, Tinsley, and others, asking to have said road laid out, the report of said reviewers, and the motion of your oratrix to revoke said order establishing said road, are to this bill attached as exhibits." The bill prayed that said defendants be enjoined (from using said road, &c.) until said *certiorari* was disposed of. None of the said exhibits were, in fact, attached to said bill.

And upon this, the Court refused to dismiss the *certiorari*.

Defendant in *certiorari* then produced the separate affidavits of ten persons, all dated in May and June, 1866, who swore that said road had been open and used as a public road for many years, (most of them saying thirteen years, and one saying twenty-five years,) and offered to read them, insisting that the facts stated in them may have been made known to the Inferior Court before the passage of the order, as nothing appeared in the return to the *certiorari* but a copy of the record.

The Court would not hear said affidavits read.

After argument, the Court sustained the *certiorari*, and ordered that the order of the Inferior Court be set aside, because the reviewers were not sworn, because no notice was posted or published, nor any written notice served on Mrs. Sproull or her overseer residing on the land through which the road ran, and because no provision was made for payment of damages as the law directs, and further ordered that said case be remanded back to said Inferior Court.

Error is assigned upon the refusal of the Court to dismiss the *certiorari* and to hear the affidavits, and because the Court sustained the *certiorari* and set aside the order of the Inferior Court opening said road.

WARREN AKIN, for plaintiff in error.

J. R. PARROTT, for defendant in error.

WALKER, J.

1. The application for a writ of *certiorari* was made in open Court. The Judge from the bench notified the opposite counsel of the application, and that counsel objected to the granting of the writ until the exceptions signed by the Inferior Court should be produced, and the Judge refused his sanction until the cause of this objection was removed. If the counsel did not examine the petition for *certiorari*, how did he know that the bill of exceptions did not accompany it? The petitioned was backed, showing to what term of the Court it was made returnable. It was applied for and granted in open Court, during a regular term, and, of course, would be returnable to the next term. The calling of the attention of the counsel to the application, which application contained evidence that the case was returnable to the next term, and which, from the facts apparent, must have been examined by the counsel, certainly was notice in writing of the time and place where the *certiorari* would be heard. The bill served on the party was written notice that the writ had been granted. Together they are a substantial compliance with the statute. At the proper time and place of hearing, the counsel is present, a continuance for ten days is agreed on, and then a host of affidavits, taken months before, presented, for the purpose of showing the rights of the parties respecting the matters in controversy. And notwithstanding all this, the Court is gravely asked to dismiss the *certiorari* because the party had no notice! There was a substantial compliance with the requirements of the statute, and the Court did right to overrule the motion to dismiss.

2. The object of giving notice to a party of the sanction of a writ is to inform him of the fact, so that he may take such steps as he may deem proper for his protection in the premises. If the party be in fact notified in writing, though not formally, and appear at the time and place of hearing the *certiorari*, the writ should not be dismissed. Courts administer to parties substantial justice according to law, and listen with little favor to mere technical objections not affecting the

merits of the controversy. The Acts of our Legislature, as well as the spirit of the age, are in favor of arriving at substantial justice without much regard to mere forms. If a party be notified, however informally, and is present in Court at the proper time, the tendency of the Courts is to hold him bound. If in consequence of a want of time for preparation the party be unprepared to proceed then, the Courts by continuance, or otherwise, are disposed so to direct the proceedings that a hearing may be had on the real merits rather than turn parties out of Court on mere technicalities. The Courts possess ample discretionary powers to protect the rights of all suitors, so that complete justice may be meted out to all. If a party be guilty of *laches*, the Court will impose such penalty as the justice of the case may require.

3. Upon the hearing, the defendant in *certiorari* proposed to read sundry affidavits taken after the trial in the Inferior Court, for the purpose of showing that though upon the case as then made the plaintiff might have a good cause for *certiorari*, yet that upon a new trial it could do the party no good; and the Superior Court should pass upon the merits of the controversy, viewed in the light of these *ex parte* affidavits. Or to express it differently, if the Inferior Court, upon the case as made before it, committed an error, the Superior Court should not correct that error for the reason that on another trial the defendant can get up evidence sufficient to show that justice was done after all. The object of a *certiorari* is "to correct errors in inferior judicatories," and to enable the Superior Court to correct these errors, the case, as made in the Court below, should be presented to the Superior Court, and it has no authority to hear the case *de novo*. Certainly the Inferior Court committed no error in not hearing and acting on these affidavits, because they were not tendered. When the case is remanded, the party can offer such legal testimony as he may see proper, and the action of the Court upon it will be subject to review. The course proposed by plaintiff in error would confer upon the Superior Court original jurisdiction in cases which are properly cognizable elsewhere. No authority was read in favor of the power thus



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 Justices Inf. Court of Twiggs Co. vs. Griffin et al.
 

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claimed for the Superior Court, and we have no knowledge that any such exists. The Superior Court did right to repel the proposed affidavits.

4. There being no evidence that the road in controversy had existed for seven years, the Inferior Court had no authority to declare it a public road without compensating the owners of the soil for the damages thereby sustained. Whether a road made by use, such as is usually called a "neighborhood road," is technically a "private way," may admit of doubt. The Code, section 692, authorizes the Inferior Courts "to grant private ways to individuals," &c. Does not section 709 refer to private ways thus granted? Of course, the rights of the public by prescription or dedication may exist aside from this provision of the Code. The Court did right to sustain the *certiorari*.

Judgment affirmed.

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JUSTICES OF THE INFERIOR COURT OF TWIGGS COUNTY,  
 plaintiffs in error, vs. E. S. GRIFFIN et al., defendants in  
 error.

NOTE.—WARNER, C. J., did not preside in this case.

Under the Act of December 10, 1866, "to provide for the citizens of Twiggs County, to settle the question of the removal of the county-site," (pamph. Acts, p. 44,) the Superior Court, by *mandamus*, required the Inferior Court of that county to turn over to the building committee appointed by the citizens of Jeffersonville and vicinity the Court-house and Jail, upon said committee giving security for their complying faithfully with the terms of said Act. Held that the Superior Court did right.

*Mandamus*. Decided by Judge COLE, Twiggs Superior Court, March Term, 1867.

The General Assembly, in December, 1866, enacted that the question of removing the Court House and jail of said county should be submitted to the voters of the county. It

was enacted that if a majority favored removal to Jeffersonville, the county-site should be Jeffersonville: *Provided*, the citizens of Jeffersonville and those adjacent thereto shall build a Court-house and Jail without taxing the citizens of said county therefor, and that the Justices of the Inferior Court are (in that event)-authorized to turn over to the committee which may be appointed to build the Court-House and Jail, the old Court-house in the town of Marion, and "said buildings are to be under the supervision of said Justices."

The election was held and a majority vote had for removal. The citizens of Jeffersonville met, took up subscription for building said houses; and appointed defendants in error a building committee.

The building committee called on the said Justices, tendered a bond in the penal sum of \$100,000.00 for indemnity to the citizens of said county if they failed to remove and rebuild the Court-house and Jail without taxing the citizens therefor, and asked that the old buildings be turned over to them. Two of the Justices were willing to comply with this request, but a majority of them refused, and passed the following order: "It is ordered, by a majority of the Court that the building committee let out to the lowest bidder, the removal and rebuilding of the Court-house and Jail from Marion, its present locality, to Jeffersonville, and when the lowest amount for said removal and rebuilding is ascertained, then that amount to be deposited with the County Treasurer of said county, and he give his receipt therefor. After which, said Court-house and Jail will be turned over to the building committee upon their giving bond for the faithful performance in rebuilding said Court-house and Jail upon the present plan and dimensions, furnishing and replacing all timbers that may be decayed, or destroyed by said removal, also to replace in good order all the furniture of said Court-house and Jail, the buildings to have two coats of paint inside and out of said buildings, the chimneys and underpinning to be plastered, painted, and penciled in workmanlike manner."

The petition for *mandamus* set forth said facts, averred

that the action of said Justices was unlawful and an abuse of their authority, and injurious to the building committee and other citizens, who in good faith were trying to comply with said Act of the Legislature.

Rule *nisi* was issued, calling on said three Justices to show cause why they should not turn over said buildings. For cause they averred that the building committee was self-constituted, and was not legally authorized to make said demand; that the Act did not require them to turn over the buildings to a committee, but left the matter of removal to the supervision of said respondents, that petitioners did not tender any bond, but only offered to make one, not naming their security, that they are acting in good faith as officers under the Act, and are not injuring the citizens of said county, but protecting them in this regard.

At the trial, a subscription list amounting to \$2,540.00, an obligation signed by eighteen citizens acting as a building committee, binding themselves to give the bond aforesaid, and to build the Court-house and Jail at Jeffersonville, and the proceedings of the meeting appointing said committee and allowing them so to act, were read.

The Court ordered that said order of the three Justices of the Inferior Court be set aside and annulled; that the Inferior Court of said county turn over to the building committee said buildings upon said committee executing and delivering to said Court a bond, with sufficient security, in the sum of ten thousand dollars, conditioned for the rebuilding of said Court-house and Jail at Jeffersonville in a good and substantial manner, and upon the present plan, and to be as well put up and finished as the present buildings, and upon the further condition that the buildings are to be removed and put up without expense to the county, and that the removal and rebuilding be under the supervision of said Inferior Court, to aid and assist the building committee in building the Court-house and Jail at Jeffersonville, and to see that they are faithfully and in good and substantial manner put up on a lot to be supplied by the citizens of Jeffersonville, that the Justices may do this in person or by a committee

appointed by them for that purpose, but in either event their object should be to facilitate, and not to retard or defeat the removal.

To this order of the Court plaintiffs in error excepted, and assign the same as error.

LYON, DEGRAFFENREID, and SHORTER, for plaintiffs in error.

CROCKER and SON, represented by CHARLES HARRIS, for defendants in error.

WALKER, J.

We see no error in this record. The Act contemplates a "committee" "appointed to build the Court-house and Jail," but does not provide for the appointment of that committee. It requires the citizens of Jeffersonville and those adjacent thereto to put up the public buildings. It would seem to be proper that those who are bound to erect the buildings at the new county-site should appoint the building committee from among themselves, as such persons would be the more likely to carry out the objects of the Act.

It was the duty of the Inferior Court to co-operate with the citizens of Jeffersonville and vicinity in carrying out this public law of the State. They should not have thrown obstacles in the way of its execution. It was their duty to see that the interests of the county were protected by ample security; and this was proposed to be given by the building committee as a condition precedent to the turning over of the possession of the Court-house and Jail. The passage of the order by the Inferior Court requiring a deposit of money, &c., was an effort, we think, to defeat the object of the Act; and the Superior Court did right to vacate that order, and require a compliance with the statute. The Judge was careful to provide for the giving of good and ample security by the building committee to carry out in good faith the provisions of the statute; and that the removal and rebuilding be and remain under the supervision of said Inferior Court.

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Skrine vs. Simmons.

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The Judge seems to have been very careful to guard the interests of the tax payers in every respect, and to continue the buildings subject to the control of the Inferior Court, as by law contemplated, most clearly. We suspect the real cause of complaint is against the Act itself, rather than against the decision of the Court in executing the Act.

Judgment affirmed.

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WILLIAM A. SKRINE, JR., plaintiff in error, vs. JOSEPH T. SIMMONS, defendant in error.

NOTE.—WARNER, C. J., did not preside in this case.

1. A judgment, rendered by a Court of competent jurisdiction cannot be collaterally attacked; it is valid until set aside according to the rules of law.
2. One judgment may, upon motion, be set off against another when such set-off is equitable.

Motion to set-off Judgment. Decided by Judge HOLT, in Burke Superior Court, November Term, 1861.

Joseph T. Simmons and his wife (formerly Mary R. Skrine), with John J., Charles C., and Eugenius A. Skrine, filed against Quintillian Skrine, as administrator of William A. Skrine, deceased, a bill for discovery, account, and distribution.

The cause was submitted to arbitration, and under the award and decree thereon, was fully settled as between complainants and said administrator.

In order to do full equity, said complainants also submitted certain accounts between themselves, growing out of said estate, to arbitration. By this award and decree, it was fixed that said Simmons owed certain sums to said other complainants, and to William A. Skrine, Jr., another heir.

Now, William A. Skrine was not a party to said bill, or

either of said submissions; but the order for submission directed the arbitrators to award to said William A. Skrine, Jr., one-fifth of the estate, and that complainants should have the further aid of the Court for settlement of said estate among themselves and said William A., Jr., should he come in and be made a party.

Said decree was had in May, 1855. At May term, 1859, said William A., Jr., petitioned the Court to be made a party complainant to said bill, and that he be allowed to enter judgment against said Simmons for said one-fifth, which had been by said decree ascertained to be \$1,808.65. The order was passed, and judgment entered accordingly.

At May term, 1860, Simmons obtained a judgment at common law against William A. Skrine, Jr., and William Bynn, security, on appeal for \$1,212.05, with interest.

At said last term, William A. Skrine, Jr., alleged that said Simmons was insolvent, and prayed that his judgment against said Simmons might be credited by the said judgment of Simmons against him, and that this last mentioned judgment be entered satisfied. The insolvency of Simmons was not denied.

The Court refused to allow the judgments thus set-off, on the ground that, in his opinion, William A. Skrine, Jr.'s, said judgment was invalid under the facts aforesaid. To this ruling, William A. Skrine excepted.

JONES and STURGIS, A. M. ROGERS, for plaintiff in error.

MILLER and JACKSON, for defendant in error.

WALKER, J.

1. The Court below refused to set-off one judgment against the other on the ground that Skrine's was invalid. Why invalid, we are unable to understand. It was rendered by a Court of competent jurisdiction, and was therefore valid until set aside by a proceeding instituted directly for that purpose. It could not be collaterally attacked on account of any irregularity in its procurement. Walker vs. Morris, 14 Ga. R., 323; Cochran vs. Davis, 20 Ga. R., 581.

Sanders vs. Etcherson.

2. The judgments being valid, why should not the larger be extinguished *pro tanto* by the smaller? Our Court, in *Meriwether vs. Bird*, 9 Ga. R., 597, quotes, with apparent approbation, the case of *Commonwealth vs. Clarkson*, 1 Rawles' Rep., 291, which decides that mutual demands extinguish each other *by operation of law*, without waiting for any act of the parties." In *Celquit vs. Bonner*, 2 Kelly's Rep., 155, this Court holds that "one judgment may be set-off against another, although all the parties to the different records are not the same." See, also, *Meriwether vs. Bird*, *supra*. Code, sections 2843, 3396, 3014, and 3015. No good reason has been suggested, why the one judgment should not be set-off against the other, and none such occurs to us. The Court erred in refusing the motion, and we therefore reverse the judgment.

Judgment reversed.

WILLIAM SANDERS *et al.*, plaintiffs in error, vs. JOHN ETCHERSON, defendant in error.

NOTE.—WARNER, C. J. did not preside in this case.

1. Where several joint defendants are declared against as "of said county," some being served, and *non est inventus* returned as to the others, and a plea in abatement is filed, alleging that some of those not served reside in other counties in this State; the plea will be overruled, and the case will proceed against those served; the Court in its discretion, may delay the trial and have the other parties served.
2. If suit be pending against two or more, and some of the defendants die, the action may proceed against the survivors.
3. If a general verdict be rendered in a case where some of those named in the writ as defendants, are not served, and others are dead and their representatives not parties defendants, the intendment of law is, that the finding is against those only who are parties to the issues tried by the jury.
4. Where a judgment has been rendered and execution issued therefrom, the mere absence of the execution unaccounted for, is no evidence that the judgment has been satisfied. If a party alleges the payment, he should establish the fact of such payment by proof.

6. Certain stockholders of a Company, under their hands and seals, guaranteed the payment of all the debts of said Company then outstanding, and bound themselves to pay all of said debts to the creditors, who would indulge the Company upon their claims, for ten months from that date. Held that a creditor of the Company at the time, who indulged the Company ten months, was entitled to recover the amount of his debt against the Company, from said stockholders, without having notified them that he would so indulge the Company. By complying with the terms prescribed, the creditor entitled himself to the benefit of the provisions of the guaranty or obligation.

Guaranty. Tried before Judge HUTCHINS. Gwinnett Superior Court. November Term, 1866.

The Lawrenceville Manufacturing Company, on the 1st August, 1854, made and delivered to John Etchison their note for \$380.88, due one hundred and sixty days after its date.

Subsequently, to-wit: on the 7th day of February, 1855, twenty-seven stockholders of said Company executed a guaranty in these words: "GEORGIA, Gwinnett County.—We the the undersigned, stockholders of the Lawrenceville Manufacturing Company, hereby guarantee the payment of all the debts heretofore made and now outstanding against said Company, and bind ourselves personally for the payment of the same, to all the creditors of the Company who will not sue, but indulge the Company upon their claims for ten months from this time, we to be liable to the creditors for the whole amount; but as between each other in proportion to the stock owned by each." On the 16th August, 1856, Etchison sued the Company on said note, and obtained final judgment 17th March, 1857.

Afterwards he brought suit upon said guaranty against all of the guarantors, alleging that they all resided in said county. Fourteen of the defendants were served. As to the others, the sheriff made this return: "William Sanders not found in this county—Richard Whitworth, Ancelly Anthony, James Garmany, Wilson Kemp, Joshua K. Sparks, John S. Porter, Amaziah Orr, Wilson R. Alexander, Asa Wade, James R. Jackson, David H. Fraser, James C. Patterson, this August 26th, 1859. WALTON CAMP, Sheriff."



At the appearance term, September, 1859, the defendants who had been served plead, that they signed said guaranty jointly with those not served, and set forth the residences of those not served, who were in life, and the residences of the legal representatives of those not served, who were dead, some in Gwinnett County and others elsewhere.

Time was given for service, and those others were served. During the progress of the case, the death of eight of these guarantors, including three of those who had not been served, was suggested of record.

There was no other plea filed, except *non est factum* by Joshua S. Wilson alone.

The case stood for trial on the appeal, November Term, 1866. The parties having announced ready and a jury being empanelled, defendants objected to the trial proceeding because the other parties had not been served, and no sufficient return of *non est inventus* as to them had been made. The objection was overruled.

Plaintiff read in evidence said guaranty, said note and the said declaration and judgment thereon.

Plaintiff introduced ROBERT M. GOWER, who testified, that he held a claim against said Company about the time the guaranty was offered, and that he sued said Company and collected the money thereon.

Plaintiff closed. Defendant introduced no evidence.

After argument and the charge of the Court had been heard, the jury rendered a verdict for \$380.88, with interest and costs of suit.

Defendants moved for a new trial on the following grounds:

1st. Because the Court erred in overruling the plea in abatement, and forcing defendants to trial without service being perfected upon the other guarantors.

2d. Because the verdict was contrary to law, contrary to the evidence, and without evidence.

The Court refused the new trial, and that refusal is assigned as error.

SIMMONS & WINN for plaintiff in error, cited as to the service and plea in abatement, *Raney vs. McRea*, 14th Ga. R., 589; and contending that this was not a guaranty but only a proposal (under the evidence) cited *Comyn on C. 1*, 2d Bouv. Ins. 56; 2d Stark. Ev. 371; *Stafford vs. Lowe*, 16th John. R. 67; *Beekman vs. Hale*, ib. 134; *Soller & Warley vs. Menry*, 1 Bailey S. C. R. 823; 6-Hill N. Y. R. 540, etc.

N. L. HUTCHINS Jr., T. M. PEEPLES, W. HOPE HULL, for defendants in error, cited 2d Am. Lead, Cas., pg. 1 to 99.

WALKER, J.

1. The return of the sheriff in this case is not very formal, but the legal effect of it is a return of *non est inventus* as to the parties not served. The petition alleges all the parties named as defendants, to be "of said county." Under this state of facts, had the plaintiff a right to proceed against those defendants who had been served? Our understanding of the practice, under the act of 1820, Cobb's N. D. 484-5, Code 3263, is, that upon a return of *non est* as to any defendant against whom suit has been brought, as of the county where the suit is located, the Court will permit the plaintiff to proceed against those served. We are not disposed to disturb this practice. A plea in abatement should not be sustained by showing that the defendants not served reside in some other county in the State. The course adopted by the Court in this case seems to be a very good one, i. e. to delay the trial and give time to bring in the other defendants who may, by the sworn plea of the defendants served, be shown to be within the jurisdiction of the Court. We incline to think it will be better to leave the direction of such cases to the discretion of the Courts below; and their action should not be controlled except when an abuse of that discretion is shown.

2. That the plaintiff had a right to proceed against the surviving defendants after the death of some of those served, without making the representatives of the deceased parties, can admit of no doubt. Code 3377:

3. It is insisted that this verdict is contrary to law because

it is general against all the defendants, as well those not served and those dead, as those who are parties to the issue. If this be an error, it is a mere irregularity which, on motion, the Court could correct. Certain parties were at issue; they were the plaintiff on the one side, and the defendants who had been served and were in life, on the other. The jury passed upon the issues between the parties thereto. The intendment of law is, that the finding is against those only who were parties to the issue; no others were heard in the assertion of their rights. The verdict is certainly valid against these parties who are here complaining; they had their day in Court. If an effort should be made to enforce the judgment against any of those who were not parties to the issue, it will be for them to take such steps as may be necessary to protect their rights.

4. It was insisted, that as a judgment was shown in favor of the plaintiff, against the Lawrenceville Manufacturing Company, and as the execution issued therefrom was absent and unaccounted for, the law presumes that the debt has been paid. Plaintiff showed a debt of record due to him, and if it had been paid, it certainly was for the defendants to prove it. The mere absence of the *fi. fa.* was no evidence of payment; nor did the fact that the Company paid Gower his debt, raise a presumption of payment to the plaintiff. In *Reynolds vs. Lyon*, 20 Ga. R., 225, this Court decided that it is not necessary, in a suit to revive a dormant judgment, for the plaintiff to prove that an execution issued thereon is not vital and effective. If such be the fact, it is matter of defence. And so say we in this case. If the judgment be paid, it is matter of defence.

5. The great question in this case arises out of the construction of the instrument sued on. Much has been written on the subject of guaranty, and many cases decided involving questions connected with it. It is difficult, perhaps impossible, to reconcile all the decisions. In 2 Am. L. C., from p. 33 to 101, this whole subject is elaborately examined, and all the cases collated. From an examination of the decisions for the purpose of determining in what classes of cases notice of

an intention to act under a guaranty must be given to a guarantor, in order to bind him; and in what classes of cases a guaranty will take effect on the doing, or forbearing, some definite thing as its consideration, perhaps the following general rule may fairly be deduced: whenever this guaranty is not positive, but amounts to a mere offer to guaranty, if the other party will agree to accept it; or where the credit to be given, or other action, which is to be the consideration of the guaranty, is executory and uncertain as to the amount for which, or the time at which, the guarantor is to become liable—as for instance, an offer to guarantee payment for goods of uncertain kind, value or amount; to be sold at a future time—then notice of acceptance must be given to the guarantor in order to bind him. But where the undertaking of the guarantor is positive, and the amount he agrees to guaranty is fixed, and the guaranty is to take effect on the doing or forbearing some definite thing as its consideration, then no notice of acceptance is necessary; but the liability of the guarantor is fixed as soon as the consideration is completed. This is substantially the rule deduced by our brother Hull from the authorities, and we are disposed to adopt it as a correct deduction from the numerous decisions made on the subject of guaranty. In 2-Bouv. Ins., 56, the rule is laid down thus: “If the instrument does not express an absolute engagement, but a proposal or offer to guaranty, the contract is not complete until the party to whom the proposal has been made, has signified his acceptance of it. A distinction must be made between an *offer* to guaranty at a future time, and an *absolute present guaranty*. The former is not binding till accepted; the latter takes effect as soon as made. An example or two will explain this difference: ‘I guaranty the payment of any goods which A. B. delivers to C. D.’ is a present guaranty, and the party to whom it is given may act upon it without further communication. On the other hand, ‘I have no objection to guaranty you against any loss for giving them this credit;’ ‘I have no objection to be answerable as far as £50. For any reference, apply to Messrs. B. & Co., of this place,’ have been held as mere proposals to guaranty, and

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that the party to whom they were severally made, ought to have given notice to the makee of his acceptance." Apply these tests to this contract, and we are very clear that it is a present absolute guaranty, and the defendants are liable. Its language is, "We hereby guaranty the payment of all the debts heretofore made and now outstanding against said Company, and bind ourselves personally for the payment of the same, to all the creditors of the Company, who will not sue, but indulge the Company upon these claims for ten months from this time." The consideration for the guaranty was indulgence of the Company for ten months from that date without suit—this indulgence was given. This plaintiff was one of the class to be guaranteed,—his debt was theretofore made and then outstanding against the Company; the amount was fixed, and the guaranty was to take effect on the forbearance to sue, as the consideration; and therefore no notice of the acceptance of the guaranty was necessary. Such being the case, the Court did right to hold defendants liable.

Judgment affirmed.

**GALHOUN & BEDDINGFIELD, plaintiffs in error, vs. THE MANUFACTURERS' BANK OF MACON, defendant in error.**

NOTE.—WARNER, C. J., did not preside in this case.

C. & B. drew a special draft in favor of M. B., on C. & G. "against 172 bales of cotton, the title of which is conveyed to M. B., and is consigned to you, (C. & G.) subject to the payment of this draft." C. & G. accepted the draft. Upon a suit by the payee, vs. the drawers, the Court charged the jury, that "under this contract, the plaintiff had the right to take control of the cotton consigned to C. & G., and take it out of their possession." Held that this charge was wrong.

Assumpsit, &c. Tried before Judge COLE. Bibb Superior Court. November Term, 1867.

Calhoun & Beddingfield drew their bill of exchange or special draft as follows :

"MACON, GA., November 3d, 1860.

MARKS :	} Fifteen days after date, pay to the order of
S. J. R.—28	
C. C. 63	
W. O. L. 25	
J. F. 56	
—	} the Manufacturers' Bank of Macon, eight
172	

thousand five hundred and thirty-three dollars and forty cents, for value received. This draft is drawn against 172 bales of cotton, marked as per margin, the title to which is hereby conveyed to said Bank, and which I consign to you, subject to the payment of this draft to said payee or his order.

Yours, &c.,

CALHOUN & BEDDINGFIELD."

To CRANE & GRAYBILL, Savannah.

Crane & Graybill accepted it, and it was endorsed :

"Pay A. Bruce, Cash., Esq., or order.

G. W. HARDY, Cashier."

It was also endorsed with a credit of \$7178 54, dated May 1st, 1861. The money was advanced by the Bank, the cotton sent to Savannah; the draft went to protest and formed the basis of this suit.

The defence will be seen from the facts :

The plaintiff read in evidence the notarial certificate of protest of said draft. It was in the usual form, dated November 24th, 1860, and stated the presentment and demand, and refusal of payment on the 21st November, 1860, and that on this last day, notices of such demand, etc., for Calhoun & Beddingfield and G. W. Hardy, Cashier, were mailed by the Notary Public, under cover, addressed to the latter at Macon, Georgia.

Plaintiff then offered G. W. HARDY as a witness : On his *voir dire*, it appeared that though not when the draft was made, nor then, a stockholder in the Bank, yet in the meanwhile, while the Bank was in suspension, he had been, and thereupon defendants' attorney objected to him as incompetent. This objection was overruled by the Court.

HARDY then testified : that he was the Cashier of the Bank

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at the date of the draft and when it fell due, and Mr. Armstrong was the book-keeper. Hardy received the protest and notices by mail, from Savannah, and although he did not recollect what was done in this case, his uniform custom was when such notices had to be re-mailed, to do so, and when they had to be served personally in the city, to hand them over to Mr. Armstrong for service, and he believed he observed this custom in this case. He did not know what Armstrong did with the notices.

The defendants were in the Bank some four or five days afterwards, and from their conversation in relation to the transaction in Savannah, they knew of the dishonor of the draft. The understanding at the time the money was advanced, was, that if the cotton fell short, the drawers were to make up the deficiency and the difference between the face of the draft, and the credit thereon is the deficiency. Here, by permission of the Court, the draft was read in evidence, defendant objecting thereto.

Plaintiff having closed, defendant read the interrogatories of CRANE & GRAYBILL. They testified that they knew of the shipment of 172 bales of cotton by Calhoun & Beddingfield, marked (as in the margin in said draft) consigned to Crane & Graybill, and of the draft already described. The cotton was received by Crane & Graybill (after they had accepted the draft) and placed in store.

After offering the cotton, and finding the market depressed, owing to the difficulty in negotiating, they wrote to Calhoun and Beddingfield, and the President of the Manufacturers' Bank, who owned the draft, to have it removed, or to allow them to ship the cotton to Boston. Calhoun & Beddingfield replied that Mr. Bond, President of the Manufacturers' Bank, would instruct them about the cotton and draft, and Mr. Bond wrote them that he had instructed Mr. Hiram Roberts, President of the Merchants' and Planters' Bank, Savannah, who held the draft, to let it lay over and allow them time to sell or ship the cotton.

The day before the draft fell due, Graybill saw Mr. Roberts, who confirmed what Mr. Bond had written, and agreed

to allow them to ship the cotton to Boston by steamer, then on the way from Boston to Savannah, and give him a draft at thirty days, to take up their acceptance. The day the draft was due, Mr. Graybill saw Mr. Roberts again, who fully confirmed the arrangement made with Graybill, and to make Roberts safe in the meantime, Graybill gave him the warehouse receipt to hold. On Sunday morning, four days thereafter, they got a note from Mr. Roberts through the Post-office, saying he had concluded to ship the cotton and they could still have the control of it if they wished. On Monday morning, 26th November, 1860, Graybill called on Roberts for an explanation; he admitted his engagement to allow them to ship the cotton to Boston, but said he had changed his mind. They declined to have anything to do with the shipment to Liverpool, and demanded the acceptance and bill of expenses on the cotton, which was refused. Graybill then went to Macon and saw Bond, President of the Manufacturers' Bank, who said Mr. Roberts had written him that he had agreed to allow them to ship the cotton to Boston, which was perfectly satisfactory to him, expressed surprise at the course of Mr. Roberts, said they had acted perfectly right, and that their acceptance should be given up, and their expenses on the cotton paid, that he would write Mr. Roberts the next day about it. This conversation was in the parlor of the Manufacturers' Bank, on Wednesday, the 28th November, 1860, first between Mr. Bond and Mr. Graybill, and was then repeated in presence of Mr. Calhoun.

If they had been allowed to carry out the arrangement entered into with Mr. Roberts, to ship the cotton to Boston, it would have paid out in full, and the reason why they confidently assert this, is, that one lot of 180 bales of cotton consigned to them by another party which they did ship by the same vessel on which they had arranged to ship this cotton, and costing as high or higher than this, did pay out in full. If they had been permitted to hold the cotton in Savannah twenty or thirty days, it would have paid out in full. If the cotton had been sold in Savannah, it would have paid the draft, but not the expenses. The cotton was shipped to Liv-



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Liverpool by direction of Mr. Hiram Roberts, President of the Merchants' and Planters' Bank, without their knowledge or consent, it having been put on board the vessel before they were apprised of it. If they had not made the arrangement with Mr. Roberts, by consent of Mr. Bond, to ship the cotton to Boston, they would have made other arrangements and taken up the draft.

Graybill says Bond, President of the Manufacturers' Bank, stated to him, and he is confident repeated in presence of Calhoun, that Roberts had shipped the cotton on his own responsibility, and that he should look to him for any loss on it.

In answer to the cross-interrogatories they testified : They saw the samples of the cotton and offered it for sale, and could have sold it the day it arrived for sufficient to pay the draft the day it was due, but the class of buyers then in the market had some difficulty in negotiating to pay their purchases, but for the interest of all concerned; they feared to risk it.

The cotton was in their possession as per consignment, and they made a positive agreement to ship it to Boston, but did not turn it over to any one ; but on the day the draft was due, they left the ware-house receipt for the cotton, under a positive engagement with him to ship the cotton themselves to Boston by steamer, Joseph Whiting, expected in a few days. The cotton was shipped to Liverpool within three or four days after maturity of draft, without their knowledge or consent, and in violation of the agreement. Cannot state positively that the cotton would have sold for amount of draft the day it was due, nor what would have been the deficiency.

They proposed to ship this cotton to Boston as before stated, and made arrangements so to do, and only under that positive arrangement lodged the ware-house receipt with Mr. Roberts. Calhoun & Beddingfield did consent to their shipping it to Boston, but they have no knowledge of their consenting to its shipment to any other place.

Defendant also read in evidence Mr. Bond's letter, as follows :

"MACON, November 19th, 1860.

MESSRS. CRANE & GRAYBILL ;

*Gentlemen*—We have written to Mr. Roberts to note the bill drawn by Calhoun & Beddingfield, and hold on a few days and give you a chance to sell or ship to raise the money.

Yours, truly, E. BOND."

Defendant closed, and plaintiff in rebuttal, examined E. BOND, President of the Manufacturers' Bank. He testified that he wrote the said letter just before the draft was due, and also instructed Mr. Hiram Roberts, the agent of the Bank in Savannah, to have the draft duly noted, but to give Messrs. Crane & Graybill, acceptors, a few days indulgence in which to sell or ship the cotton; that soon after he received notice from Mr. Roberts of the shipment of the cotton to Liverpool; he saw Mr. Beddingfield and informed him of the fact, and asked him if the shipment of the cotton should be on account of the Bank or on account of Calhoun & Beddingfield, who replied that he thought the shipment to Liverpool was about as good a disposition of the cotton as could be made, and that the shipment should be on account of Calhoun & Beddingfield.

On cross-examination he said he did not inform Mr. Beddingfield at the time that if the shipment should be made on account of the Bank, that the draft would be given up, and that the expenses on the cotton in Savannah would be paid by the Bank, nor did he then tell Beddingfield that Roberts, and not Crane & Graybill had charge of the shipment of the cotton to Liverpool, as Calhoun & Beddingfield had before that time been informed as to the facts of said shipment, as testified to by Crane & Graybill.

When Bond was introduced no objection was made on account of his having been a stockholder in the Bank.

The Court charged the jury that under the contract sued on, the plaintiff had the right, as against the defendants, to take control of the cotton consigned to Crane & Graybill and dispose of the same; the title to the cotton was conveyed by the bill of exchange here sued on, to plaintiff, and the plaintiff could control it, the plaintiff was the owner of the cotton,

the right of the acceptors does not arise in the case—that if, at the time Beddingfield made the statements to Bond as to the shipment of the cotton to Liverpool, he did not understand his legal rights in the case, then the defendants would not be concluded by such statement; that if they believed from the evidence that the defendants, or either of them, agreed that the cotton should be shipped to Liverpool on their account, then the jury need not necessarily inquire into the regularity of the transaction in Savannah, as proved by Crane & Graybill, as in such case plaintiff will be entitled to recover in this case the difference between the amount of the draft and the proceeds of the cotton realized on the sale thereof, if the jury believe such was the contract.

The jury returned a verdict for plaintiff for \$1,020.34 with interest and costs.

A new trial was moved for by defendants for the following alleged errors: Because the Court erred.

1st. In holding that Hardy was a competent witness.

2d. In allowing the draft read to the jury under the evidence aforesaid as to notice of non-payment.

3d. In charging that under the contract sued on, plaintiff had the right to take control of the cotton consigned to Crane & Graybill, and take it out of their possession.

4th. In charging that if the defendants, or either of them, assented to the shipment of the cotton to Liverpool on their account, then it will be unnecessary to inquire into the regularity of the transactions in Savannah, as testified to by Bond, Crane & Graybill, and in said case, plaintiff will be entitled to recover the difference between the amount of the draft and the nett proceeds of the cotton realized on the sale thereof. Because of defendants' mistake in not objecting to Bond as a witness. (This was supported by affidavit of defendant's attorneys, that he knew Bond had been a stockholder in the Bank, and thought that he had objected to him, and that the Court had held him competent.) And last, because the verdict of the jury was contrary to law and the charge of the Court, and strongly and decidedly against the weight of the evidence.

The Court refused a new trial, and defendants excepted and assign the refusal as error upon the grounds aforesaid.

B. HILL, for plaintiff in error.

JNO. RUTHERFORD, for defendant.

WALKER, J.

The Court did not correctly construe the contract sued on in this case. It is true that Calhoun & Beddingfield were the only defendants, but the question of their liability may depend upon what transpired between the Bank and Crane & Graybill. Calhoun & Beddingfield negotiated this draft, and with the money received for it, purchased the cotton named in it. Crane & Graybill accepted the draft upon the faith of the cotton consigned to them. They were the parties primarily liable on this paper, but to meet that liability the cotton had been consigned to them for sale. Surely the Bank would not be authorized to take the cotton out of their control and still hold them liable to pay the draft; and if the acceptors would be released by the Bank taking possession of the cotton, much more would the drawers be discharged.

Shall the Bank be permitted to recover from the drawers, when it is made to appear that the acceptors have been released from liability by the conduct of the holder? We apprehend not. The holder must have done no act by which a party primarily liable is released, if he would recover from any of those secondarily liable. He must not have deprived them of a remedy over against those primarily liable. If this be so, do not the rights of Crane & Graybill become a material subject of enquiry, in fixing the liability of Calhoun & Beddingfield? It seems so to us.

This cotton was consigned to Crane & Graybill, subject to the payment of this draft. It is true the draft says the legal title is conveyed to the Bank, but the whole transaction was a loan of money, and the transfer of the cotton a security for the repayment of the loan. The acceptors are the consignees mutually selected by the parties to sell the cotton and pay the

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draft; the overplus, if any, of the proceeds of the sales, after paying the draft, belongs, not to the Bank, but to Calhoun & Beddingfield. Calhoun & Beddingfield agreed that Crane & Graybill should sell the cotton and pay the draft; such was the written contract, and by that both parties are bound. By what authority, then, did the Bank take possession of the cotton and ship it to a different market? It had no such right, and the Court erred in charging the jury that "under the contract sued on, plaintiff had the right to take control of the cotton consigned to Crane & Graybill, and take it out of their possession." See *Printup vs. Johnson*, 19 Ga. Rep., 73; Code Sec. 2728. For this error we reverse the judgment of the Court below, and award a new trial.

Some of the other questions cannot arise on another trial; and the remainder can be more satisfactorily passed upon when all the parties shall have had an opportunity to be heard.

Judgment reversed.

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HIRAM SHARP, Sr., plaintiff in error, vs. THOMAS BONNER, Sr., Administrator of W. S. Bonner, deceased, defendant in error.

NOTE.—WARNER, O. J., did not preside in this case.

When a verdict, fully sustained by the evidence, is set aside by the Court as against the weight of evidence, and a new trial is granted, this Court will reverse the judgment and allow the verdict to stand.

Assumpsit. Motion for new trial. Decided by Judge UNDERWOOD. Carroll Superior Court. April Term, 1867.

This was an action on a promissory note for \$533.00, made the 5th February, 1860, by W. S. Bonner, payable to Hiram Sharp, Sr., or bearer, in specie, with ten per cent. interest *per annum*, and due one day after its date.

The defendant plead the general issue, *plene administravit*, and that the estate had become insolvent by emancipation of the slaves of deceased.

At the trial plaintiff read in evidence the note, and introduced THOMAS CHANDLER as a witness, who testified: that, as agent of plaintiff, about the 1st June, 1863, and within three or four months after administration granted, he called on said administrator, and notified him of said note, and told him that plaintiff had let deceased have gold for the note, and wished specie paid on the note. He further testified that the administrator offered to pay Confederate Treasury notes, but they were refused; gold and silver were not then circulating much; Confederate Treasury notes were the principal circulation, and circulated about like bank-bills, that witness collected about \$2,000.00 in Confederate money on debts due deceased, and that said administrator received the same from witness, that deceased had twelve or fifteen likely negroes about him reputed to be his; administrator, in 1865, told witness he had notes and judgments belonging to deceased, sufficient to pay this debt, and offered them as collateral security.

Defendant examined as a witness, A. P. STEED, who was hisson-in-law. He testified: that W. S. Bonner died in summer of 1862, that he had taxable property worth from \$20,000.00 to \$30,000.00, that in the fall of 1862, specie had ceased to circulate, that deceased was a farmer and merchandized some, (he had but little land) that the administrator sold all the property except the negroes, for Confederate money, that it would not have been prudent to sell at that time for specie, property would not have brought anything in specie, and the administrator had the said negroes in possession at the time of their emancipation.

J. M. BLALOCK was introduced, who testified: that most of the perishable property of deceased was in Alabama, and sold by defendant by the advice of witness, who was the Ordinary of said county, that defendant returned no inventory of the estate, nor any sale bill; but otherwise, had made his returns regularly.

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Defendant then read in evidence all his returns, which were substantially as follows :

Amount received for 1862, \$3,763.07 ; amount paid out 1862, \$3,450.20. None was paid to any claim of higher dignity than a promissory note ; part went to open accounts, part to defendant on settlement, and \$39.50 to the widow towards support.

Amount received 1863, \$3,159.69 ; amount paid out 1863, \$3,724.17½. Of this, \$1,149.89 was paid to the widow for a year's support, and the balance was paid to promissory notes and accounts.

Amount received in 1864, \$4,074.90 ; amount paid out in 1864, \$4,040.80. Of this, \$33.50 was paid to the widow as advancement for that year, and the balance was paid to notes and open accounts.

Amount received in 1865, \$1,870.00 ; amount paid out, \$1,609.00. Of this, \$991.00 was for the support of the widow, and the balance was paid for pork.

The evidence being closed, the Court charged the jury that if they found that the defendant had fully administered said estate, they should find against said defendant, as administrator, the amount due, to be levied of any effects that might thereafter come to his hands as administrator, that if they found the issue (on the plea of *plene administravit*) in favor of the plaintiff, then they should find the amount of the note against the defendant individually.

The verdict was for the face of the note with interest and costs of suit.

During the term a motion for new trial was made, and put only on the grounds that the verdict was contrary to law and the charge of the Court, and contrary to the evidence, and strongly and decidedly against the weight of the evidence.

The Court granted a new trial, and this is assigned as error.

CHANDLER, for plaintiff in error.

W. W. & H. F. MERRILL, for defendant in error.

WALKER, J.

We are satisfied that this administrator did what he thought was for the best ; but in doing so, he has made himself liable to pay the plaintiff's debt. It was his duty to make an inventory and appraisement of the effects of the estate, and return them to the Ordinary for record. This he failed to do, and is therefore at fault, the entire consequences of which neglect it is not necessary now to determine.

While the statute authorized the administrator to receive Confederate notes for debts due the intestate, it did not compel him to do so. In this case he was notified that plaintiff had loaned deceased gold, and would require specie in payment; indeed, the note promises to pay specie. It was the duty of the administrator to collect the assets and pay the debts, and he should have seen to it, that debtors paid such funds as would answer this purpose, he was not bound to receive any thing in payment which would not answer the purposes of the estate. Having received something that would not pay the plaintiff's debt, he must take the consequences so far as this debt is concerned.

Again, by what authority did he, from *year to year*, pay such large sums to the widow of the deceased. It is true that she was entitled to a year's support, but that was never set apart for her as it should have been, and we cannot presume, without any proof, that so much as he paid her was necessary for that purpose.

The Legislature doubtless intended to relieve persons situated as this administrator is, except in one particular ; and that is, he had already made himself liable to pay this debt by neglect, mismanagement and misapplication of the effects of the estate before the act of 1866. In *McIntosh vs. Hamilton*, decided at December Term, 1866, we held an administrator liable under a state of facts very similar to the facts of this case. Reiterating that we acquit this defendant of all intentional wrong, we hold, that according to law, he is clearly liable to pay this debt, and the Court erred in setting aside the verdict, and granting a new trial.

Judgment reversed.



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The State of Georgia *vs.* Bradford and Snow.

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THE STATE OF GEORGIA, plaintiff in error, *vs.* BRADFORD and SNOW, defendants in error.

NOTE.—WARNER, C. J., did not preside in this case.

1. The Act of December 18th, 1862, "to prevent the spread of small pox in this State," is not retroactive; and the State is not liable for expenses incurred prior to its passage, by the Inferior Court of a county, for the benefit of small pox patients.
2. The object of said Act was to prevent the spread of small pox, not to pay the debts already contracted by counties for the benefit of small pox patients.

Complaint under the Small Pox Act of 17th April, 1863. Tried before Judge WORRILL, Muscogee Superior Court, November Term, 1866.

Bradford and Snow sued the State for goods furnished to patients in a small pox hospital upon the order of the Inferior Court of Muscogee County, between the 22d October and 22d December, 1862, worth \$107.89.

They proved said order and the correctness of their account, and closed.

The Solicitor General, representing the State, requested the Court to charge the jury that under the Act of 13th December, 1862, the State was not liable for any expenses attending small pox cases which had been incurred prior to the passage of said Act.

The Court refused so to charge, and held that the said Act would cover as well goods purchased before as after its passage.

Plaintiff in error assigns said refusal to charge as requested and the holding of the Court aforesaid as error.

JOHN PEABODY, Solicitor General, for plaintiff in error.

IVERSON and WILLIAMS, for defendants in error.

WALKER, J.

1. Was the Act of December 13th, 1862, entitled, "An Act to prevent the spread of Small Pox in this State," (pamph., p. 33,) retroactive? By the laws in force at the time of the passing of that Act, the corporate authorities of cities and towns, and the Inferior Courts of the several counties, were authorized to establish hospitals and pest houses under such regulations as would prevent the spread of infectious or contagious diseases. Code, 1315. It is not insisted that prior to the statute of 1862 expenses thus incurred were to be paid by the State. The Act of 1862 authorized the corporate authorities of any city or town, or the Justices of the Inferior Court of each county, when any case of small pox might appear, or had appeared, to provide a hospital, &c., and that said Courts or corporate authorities should make out a "just account of all expenses accruing from *such* quarantine," &c., and the accounts so made out were to be paid out of the State Treasury.

The Act of 17th April, 1863, pamph., p. 162, provides "for the payment of expenses *incurred under*" the Act of 1862. It is by the provisions of this Act of 1863 that this action is brought. It is impossible that expenses incurred before the passage of the Act should be incurred under it. But construing the Act of 1862 by itself, it was not intended to retroact. It proposed to pay for such expenses as should be incurred under it, and did not propose to assume the debts already contracted by Inferior Courts or corporate authorities.

2. The object of the Act was to prevent the spread of small pox, not to pay debts already contracted under laws then in existence. The Court below erred in holding said Act to be retroactive, and the State liable for expenses incurred prior to the passage thereof, and therefore we reverse the judgment and award a new trial.

Judgment reversed.

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Jones vs. The State.

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GILBERT JONES, negro, 'plaintiff in error, vs. THE STATE  
defendant in error.

Judgment reversed, because the verdict is strongly and decidedly against the evidence.

Indictment for shooting at another. Tried before Judge VASON. Dougherty Superior Court. December adjourned Term, 1866.

The indictment charged the defendant with unlawfully shooting at Henry Byrd, with a pistol, on the 20th December, 1866, not in his own defence, nor under circumstances of justification according to the principles of the Code.

The State introduced HENRY BYRD, who swore: I know the prisoner, Gilbert Jones; I was sitting in Jim Howard's house, and Croff Brodenax said, "Mr. Byrd, a gentleman wants to see you out doors;" I said, "If he wants to see me, let him come in and see me;" Mr. Jackson said, "Go out and see him;" Gilbert Jones then stepped into the house and said, "Come out here, I want to see you." We went outside of the house, and Gilbert laid down his stick and asked me why I cursed him the other day; I replied, "Why did you take Mr. Towns off, when I was talking to him?" When he called me out of the house, he struck me and I struck him, I don't know which struck first, prisoner then shot at me and struck me on the finger and shoulder, three pistols were fired.

Cross-examined, he said: When we went out of the house, Gilbert said to me, "What did you curse me for?" I said, "What did you call Mr. Dick Towns off for, when I was talking to him, no gentleman would have done so." Gilbert raised his hand, but I do not know which struck first; Gilbert pulled off his coat; I did not say to him, "Have you the audacity to pull off your coat to fight me?" I did not shoot. No one gave me a pistol before I went back into the house. I cursed Gilbert in the previous difficulty, but did not call him a d——d liar. I did call him a d——d piney-woods son-of-a-bitch; Gilbert said, "let's go out of the corporation." When Simon Johnson said he could whip all

three of us in a minute and a half, I replied, it was doubtful. Gilbert Jones said he could not do it, and that he could whip all quicker than rain; I replied, "You can't do it;" Gilbert said, "What did you say?" I told Gilbert to come in, but did not throw my hand on my pistol when I said this, but threw my hand to my shoulder. I said to Gilbert, "When you get ready to whip me, I have the change for you, and you had better bring your coffin along." There was nearly a week between the two quarrels; I did not say to Gilbert when I went out of Jim Howard's house with him, "Yes, I meant what I said, you d——d piney-woods son-of-a-bitch;" I did not say, "Have you the audacity to pull off your coat to fight me?" I did not snap my pistol at Gilbert, no one gave me a pistol.

In rebuttal, he said: the last fuss was at Jim Howard's, just on the edge of the corporate line of the city. It was last year.

#### SURREBUTTER.

I struck Gilbert at Jim Howard's with a common black stick, the head of which was loaded, the stick would kill a man, it was a little larger than my thumb; I was hit on the shoulder and finger, there were three shots fired.

The State next examined as a witness, ESTHER HOWARD, who swore: I heard a pistol fire, and after the fuss was over and Gilbert came in the house, with his pistol in his hand, rolling up his sleeves, I asked who shot, and Gilbert said he did. Gilbert was not invited to the party, he came into the house after Henry Byrd. I heard three pistols.

ELIZA ROBINSON, sworn, said: I heard Gilbert tell Esther Howard he was the man who did the shooting, or in reply to the question, "Who did the shooting?" Gilbert said, "I am the man." Henry Byrd ran round and came into the back door. I heard three shots, one after the other.

HOWARD DUNCAN, sworn, said: I was at the shop the day before the party; Simon Johnson said he could whip all in there; Gilbert said, "You can't," and then Henry Byrd

cursed Gilbert as a d——d piney-woods son-of-a-bitch, and put his hand on his side where his pistol was, and told him he had better bring his coffin, if he wanted anything out of him, and called him a G——d d——d liar, and used much other opprobrious language.

Upon cross-examination, he said: I don't remember what Gilbert said to Byrd, but he said something before Byrd cursed him for a G——d d——d liar, son-of-a-bitch; I was not invited to the party.

BUNK JONES, sworn, said: I was present at Jim Howard's the night of the fuss, heard Henry Byrd say if Gilbert wanted to see him more than he wanted to see Gilbert, he could come in the house and see him. I saw Byrd and Gilbert come out of the house together, side by side, and both walked off from the door a few steps, when Gilbert asked Byrd if he meant what he said the day before; Byrd replied, "Yes, damn you, I did." Gilbert then commenced pulling off his coat, and Byrd asked him if he had the audacity to pull off his coat to fight him, and at the same time, struck Gilbert with a stick, and presented his pistol. Byrd pulled out his pistol on the steps, as he came out of the door; the first fire was on the side on which Byrd stood, the other two on the side of the prisoner. I was present at the shop of Howard Duncan, and heard Byrd curse Gilbert, the day before the fuss at Jim Howard's; I heard him call Gilbert a d——d liar and a G——d d——d piney-woods son-of-a-bitch; I saw him put his hand on his pistol, and said to Gilbert, "When you get ready to whip me, you had better bring your coffin along."

Cross-examined, he said: Byrd pulled out his pistol when he stepped out of the house. Byrd was farthest from me. It was not a very dark night, the stars were shining, it was not cloudy. I could see Byrd's stick, could not see who fired, saw Byrd and Gilbert all the time they were fighting, saw Byrd snap his pistol, saw Croff jerk a pistol out of Gilbert's hands when he started to go back into the house; Byrd struck first with a stick; I am Gilbert's brother. I overtook Gilbert on the way to the party, I did not go there to assist

Gilbert, was not invited to the party, and knew nothing about Gilbert's having gone there to raise a difficulty. I tried to quash the difficulty ; I was standing near the door, and Byrd and Gilbert were standing with their sides towards me.

WILLIAM BELL, sworn, said : I was at the party and inside the house, when the fuss commenced. When asked if he meant what he said the day before, Byrd replied, " Yes, you damned piney-woods son-of-a-bitch, I meant just what I said, and that you had better bring your coffin with you ;" Byrd said, " You big-headed son-of-a-bitch, you pull off your coat to fight me !" I saw Byrd draw a pistol and point it at Gilbert. Byrd struck first.

Cross-examined, he said : I was not invited to the party, I was in the house when the fuss commenced, I saw Byrd strike at Gilbert with a stick, saw Byrd snap his pistol at Gilbert, before Gilbert struck Byrd ; Byrd and Gilbert were eight or ten feet from me ; first pistol was fired from Byrd's side ; Byrd struck first and snapped pistol at Gilbert at the same time.

CRAWFORD BRODENAX, sworn on the part of defendant, said : I was present the night of the party at Jim Howard's house, and of the fuss between Byrd and Gilbert. Gilbert asked me to tell Byrd to come out there, that he wanted to see him ; I told Byrd a gentleman wanted to see him outside of the house, Byrd replied, if any man had more business with him than he had with that man, he could come in and see him. Gilbert then came into the house and asked Byrd out, and then asked him what he meant by what he said to him the other day ; Byrd said, " I did say you damned piney-woods son-of-a-bitch, you had better bring your coffin." I saw Byrd strike first.

Cross-examined, he said : Gilbert commenced pulling off his coat ; Byrd said, " Have you the audacity to fight me ?" I am equally friendly with both ; I think a pistol was first fired from the side of Byrd, but I did not see Byrd fire it, two pistols fired from the side of Gilbert, then Byrd ran ; the pistol that Byrd had which I saw, was not fired at all, all the barrels were loaded ; the pistol Gilbert had, when I

saw it, could not have been fired, it was broke and unloaded; I jerked Gilbert's pistol out of his hand and hid it under the steps, it was a single-barrelled pistol.

JAMES KEMP, sworn, on the part of the State, said : he had known Byrd since 1858, his character was that of a good boy, had known him intimately for a long time, and he is a boy of a fine character.

The jury found Gilbert guilty.

Upon the foregoing brief of the evidence, (reported exactly as it appears in the record,) attorney for the defendant moved for a new trial on the ground that the verdict was contrary to the evidence, etc., and on other grounds not necessary to notice, as the case turned on that point in the Supreme Court.

The assignment of errors is, the overruling of said motion for new trial on the grounds taken therein.

H. MORGAN, for plaintiff in error.

D. H. POPE, Solicitor General, by SMITH, Solicitor General, for the State.

WALKER, J.

This verdict is decidedly and strongly against the weight of the evidence. The prosecutor says that he and defendant went out of the house, and defendant laid down his stick,—both parties struck,—which struck first, he does not know. He struck defendant with a loaded-headed stick a little larger than his thumb, and it would kill a man. All the other witnesses show clearly that prosecutor struck first, and some say shot first. Here was an assault made on defendant, with a weapon likely to produce death ; and he had a right to defend himself against this felonious assault, by any means at his command. Had he taken the life of the prosecutor, under these circumstances, he would have been justifiable.

Judgment reversed.

WILLIAM E. JACKSON and GEORGE F. JACKSON, executors of JOHN K. JACKSON, plaintiff in error, vs. THE SOUTHERN MUTUAL LIFE INSURANCE COMPANY, defendant in error.

NOTE.—WARNER, C. J., did not preside in this case.

Suit was brought on a policy of insurance obligating the insurance company to pay a certain sum "within sixty days after due notice and proof of the death of the" assured.—Held that allegation and proof of such notice and death are conditions precedent to a recovery on such policy.

Attachment. Demurrer. Decided by Judge SNEAD, City Court of Augusta, November Term, 1865.

The Southern Mutual Life Insurance Company, a corporation, for a certain annual premium, issued a policy insuring the life of William E. Sikes for \$10,000.00. It was stipulated by the policy that the company would pay that sum to Sikes, his executors, administrators, and assigns, "within sixty days after due notice and proof of the death of said William E. Sikes," *provided*, (among other things,) that the policy was to be void if said Sikes "shall enter into any military or naval service whatsoever (the militia not in actual service excepted). Sikes assigned this policy to John K. Jackson, by and with the consent of the company, as collateral security for a judgment for \$16,000.00 and interest, which Jackson held against him.

The annual premiums had been paid up to the 11th April, 1865. Before that time, under and by force of the Conscription Act, and against his will, Sikes had been forced into the Confederate States' Army, and of sickness not therein contracted had died.

The petition averred said facts, and "that of all and singular the premises the said company had notice and were bound to pay said insurance, according to the tenor and effect of said policy."



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Jackson and Jackson, ex'rs, vs. The S. M. L. I. Co.

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Pending the action, plaintiff died, and his said executors were made parties.

The said company, by its attorneys, demurred to said declaration.

The grounds of demurrer were—

1st. Because plaintiff does not aver that defendant ever had due notice, or that he had made due proof of the death of Sikes to the Company.

2d. Because Sikes' so being in the Confederate Army defeated the policy.

The Court sustained the demurrer on each ground, and ordered said case dismissed.

This action of the Court is assigned as error.

This case was argued December term, 1866, and held for consideration.

STARNES and JOHNSON, attorneys for plaintiff in error, cited the following: Bowring vs. Elamslie, 7th T. R., 216, *Note*; Chitty on Con., 95; Evans vs. Saunders, 8th Port., 497; Code, section 2721, par. 4; Paradine vs. Jane Aleyn, R. 26-27; Dyer, 33; B. and A. Canal Co. vs. Pritchard, 6th T. R., 750; Story on Bail, section 36; Mar. on Ins., 164-165; Bowdaile vs. Hunter, 5th Man. and G., 639; Bristed vs. Farmers' L. and I. Co., 4th Hill (N. Y.) R., 75; Burbank vs. Rockingham In. Co., 4 Fost (N. H.) R., 550; Farmers' In. Co. vs. Simmons, 30 Penn., 294; Sproul vs. N. C. In. Co., 1 Jones L. R., 126; Delaney vs. Stoddart, 1 T. R., 22; Scott, *et al.*, vs. Thompson, 1 Bos. and Pul., 185; Miller and Robertson vs. Russel, *et al.*, 1 Bay., 305; Campbell vs. Williamson, 2 Bay., 237; Baldwin vs. N. Y. L. In. Co., 3 Bosworth R., 530; People vs. Bartlett, 3 Hill (N. Y.), 570;—to show that Sikes' being in the army did not defeat the policy.

BARNES and CUMMING, for defendant, upon the first point cited 2 Phil. on In., 643, 644, 753; 12 Wendell R., 452.

And upon the second point cited Emerigon, 4, 13, 51; Angel on In., 235, 334, 354, 362; 1 Arnould on In., 2, 3, 348.

WALKER, J.

The obligation in this case is to pay "within sixty days after due notice and proof of the death of said William E. Sikes." Notice and proof are conditions precedent to a recovery in this case. Such are the terms of the contract. There is no allegation in this declaration that any such notice and proof were given to defendant, and in the argument it was admitted, as we understood it, that none was given before process was sued out. When would the right of action accrue by virtue of this policy? When would the debt become due and payable? The contract defines the rights of the parties, and specifies when the money shall be payable. The debt is not due at the death of Sikes, nor could it become due until notice and proof of the death be given; nor is it due at once upon the giving the notice and making the proof, for by the terms of the contract defendant has sixty days after this within which to pay. There is no breach of the contract until the expiration of the sixty days, and defendant shall have failed to pay; then a right of action accrues, and not before. Many reasons might be given why defendant should require such notice and proof, and then time to convert its assets into money before it should be bound to pay. It is sufficient to say that the contract requires the notice and proof, and gives defendant sixty days thereafter within which to pay, and the contract contains the measure of plaintiff's rights. *Worsley vs. Wood*, 6 T. R., 711; *Inman vs. Western Insurance Co.*, 12 Wen., 452; 1 Ch. Pl., 320-1; *ib.*, 329-30.

For want of an allegation of compliance on the part of plaintiff with this condition precedent, the Court below dismissed the action, and we affirm his judgment on that ground.

In relation to the other question made by this record, Judge HARRIS thinks the fact that the assured was conscripted and forced into the military service of the Confederate States avoids the policy. I am not prepared now so to hold. In my judgment, this is a grave question and

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Shanks vs. White.

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should be decided by a full bench. So far as I am concerned, I prefer to leave it entirely open for future adjudication when it may be necessary to decide it. As we affirm the judgment on the first point, a decision of the second is thereby rendered unnecessary.

Judgment affirmed.

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JOHN DOE, *ex dem.*, JAMES D. SHANKS, *et al.*, plaintiff in error, vs. RICHARD ROE, *cas. ejector*, and DANIEL WHITE, tenant, defendant in error.

1. Though the attorney prosecuting a case may have no authority to use the name of a party as lessor of plaintiff in ejectment, the Court should not, for this cause, dismiss the action, unless it appear, also, that the client has no authority to use the name.
2. To authorize a plaintiff in ejectment to use the name of another, he must show some connection between his title and that of the person in whose name he sues.
3. A plaintiff in ejectment should be permitted to use the name of another when he makes it clearly appear to the Court that such use is necessary for the assertion of his rights.
4. The name of a party may be used as lessor in ejectment upon proper indemnity being given, not only without, but against his consent, when it appears to the Court that such use is important to the rights of a party.

Ejectment. Nonsuit. Decided by Judge CLARK, Superior Court of Early County, April Term, 1867.

This was ejectment on the demises of William Durham, James D. Shanks, *et al.*, for lot of land number two hundred and thirty-nine, in the twenty-eighth district of said county.

Plaintiff read in evidence the grant for said lot from the State to William Durham. The *locus in quo* was admitted. The plaintiff closed.

Defendant's attorneys examined before the Court RICHARD SIMS and SAMUEL S. STAFFORD, attorneys for plaintiff, who

admitted that they did not know William Durham, had never seen him, and did not represent him, that they were attorneys for James D. Shanks, that Shanks claimed said land through William Durham, and that they used said grant for Shanks' benefit.

The Court thereupon, upon motion of defendant's attorneys, awarded a nonsuit, and refused to let the case go to the jury.

This action of the Court is assigned as error.

RICHARD SIMS, S. S. STAFFORD, for plaintiff in error.

A. HOOD, for defendant in error.

WALKER, J.

1. Ought the Court to have dismissed this action? We think not. The facts are very similar to those in the case of *Kinsey vs. Sensbough*, 17 Ga. R., 540. There the attorney had no authority to use the name of Sensbough, never knew him, was employed by Rogers, and used Sensbough's name for the benefit of Rogers. Upon this state of facts, the Court says, "Although that attorney may not know, and may not represent him, yet Harrison Rogers may know him, and be authorized by him to have this suit brought." P. 542. So here, while the attorneys may not be authorized to use the name of Durham, perhaps Shanks, for whose benefit this suit is brought, may have such authority. To have prevented a recovery in Durham's name, this possibility should have been met by proof. By reference to the case of *Adams vs. McDonald*, 29 Ga. R., 571, it will be seen that all the attorneys and the managing parties were sworn, and showed that the name of Adams was used without his knowledge or consent, and that it was used alone for the benefit of the Skeltons; and the Court would not, under these circumstances, permit a recovery in the name of Adams.

2. The Court, p. 579, says, "We have uniformly held that to authorize a plaintiff in ejectment to use the name of another, he must show some connection between his title and that of

the person in whose name he sues; (*Couch vs. Turner, et al.*, 17 Ga. R., 489; *Kinsey vs. Sensbough, et al.*, ib., 540;) that he is not invoking the paramount outstanding title to rob others, but to protect himself."

3. In *Couch vs. Turner, supra*, the Court says, "It frequently happens that owing to some defect in the chain of title the plaintiff is unable to recover, except by laying a demise in the name of some previous party. And this he should be permitted to do whenever it shall clearly appear that he has a *bona fide* claim or pretension to the premises. Otherwise it would be both unreasonable and unjust to allow the tenant to be disturbed." In this case, does it "clearly appear" that Shanks has a *bona fide* claim to the premises in dispute? The attorneys stated that Shanks claimed said land through Durham, and that they used the grant for Shanks' benefit. While this statement may be some evidence, perhaps, that Durham is a party from whom Shanks claims, yet the better rule is for the party to introduce his evidence of title, and show by that that he has a right to use the name of the party as one of his mediate or immediate vendees. We do not think it best that the plaintiff or his counsel shall decide the question of whether plaintiff has a *bona fide* claim to the premises, and therefore entitled to use the name of another for the assertion of his rights. The better course will be for all the facts to be submitted in evidence, and the Court can then give such direction as will advance the ends of justice.

If it shall appear that Shanks holds under Durham by a defective title, and that the use of Durham's name is necessary for the assertion of his rights, the Court will allow a recovery in Durham's name for Shank's benefit. In the absence of authority from the party to the use of his name, the Court will decide whether the use of such party's name is necessary for the assertion of the rights of the plaintiff or not. The Court will not lend its aid to one man to rob another of his land by using the title of a third person with whom he has no connection. *Couch vs. Turner, supra*.

4. The name of a party may be used as lessor of the

plaintiff, not only without, but against his consent, when it is apparent to the Court that such use is important to the rights of a party, upon giving sufficient indemnity against loss or damage. *Fain vs. Garthright*, 5 Ga. R., 6. But whether the use of such lessor's name be important to the rights of a party is a question for the decision of the Court upon all the facts of the case, and not of the party.

Judgment reversed.

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NATHAN BASS, plaintiff in error, vs. WILLIAM FREEMAN, Sr., defendant in error.

NOTE.—WARRNER, C. J., did not preside in this case.

1. The doctrine in the cases of *Hand vs. Armstrong*, 34 Ga., 232; *Freeman vs. Bass*, Ib., 355, and *Bass vs. Ware*, Ib., 386, re-affirmed.

Assumpsit. Warranty. Emancipation of slavery, &c. Tried before Judge Cole. Bibb Superior Court. November (adjourned) Term, 1866.

On the fifth day of November, 1858, Nathan Bass bought in Chicot county, Arkansas, from William Freeman, Sr., nineteen hundred and fifty-nine and 23-100 acres of land in said county, and seventy-three slaves.

He gave therefor his promissory notes of that date, payable to said Freeman, or bearer, as follows: for \$20,000.00 due 1st January, 1859, and for \$28,200.00 due on the 1st of January, on each of the following years: 1860, 1861, 1862, 1863 and 1864, all, except the first, bearing interest from 1st January, 1859. In return, Freeman gave to him a bond of that date, describing fully the lands and the negroes (calling them "slaves for life") conditioned to make such title to the lands as Freeman had upon payment of the purchase money aforesaid. Freeman therein agreed to allow Bass to recover and appropriate a claim for \$5,000.00 growing out of a dispute as to

the title of a portion of the land, and agreed to deliver him possession of said lands, slaves, (and other personalty) that day sold to him, on the 1st January, 1859, or sooner, if the crop was gathered, unless the delivery was prevented by death, fire or other casualty, not resulting from Freeman's carelessness or negligence.

On the same day and at the same place, said Freeman gave him a bill of sale to said slaves, describing them by their names and ages, and as being "slaves for life, now upon the plantation, this day purchased by said Bass from said Freeman, situated in Chicot county, and State of Arkansas," and for the entire stock of mules, horses, cattle and hogs, corn, fodder, wagons, carts, blacksmith's tools, gins, cotton-seed, household and kitchen furniture, ploughs, plantation tools, and all other property of a perishable nature on or belonging to said plantation.

The consideration expressed in the bill of sale was \$73,000.00, (without more) and for that consideration, Freeman warranted that the title to said slaves was good and unincumbered, and that all of them except Louisa, was sound in body and mind.

This action was founded on the last of said promissory notes. Bass plead that the consideration of this note had wholly failed, because it was a part of said consideration of \$73,000.00 given for said slaves, that Freeman had covenanted that said slaves should remain slaves for life, and that by the Constitutions of Georgia and of the United States, said slaves and their issue had been emancipated, and thereby lost to the defendant, damaging him \$150,000.00, further that the consideration had partially failed because said slaves had been taken from him and set free to his damage \$100,000.00, that Freeman had retained title to said slaves in himself, and because of emancipation, cannot make a title to defendant for them, averring that this is so by the laws of Arkansas, the *locus* of the contract, that the prosecution of this suit was in violation of Act of Congress of the United States of 17th July, 1862, and of the amnesty proclamation of 29th May, 1865, and lastly, that by Act of Congress of the United

States, and by proclamation of the President thereof, said slaves had been emancipated before this note fell due, and for these reasons prayed judgment against said plaintiff.

At the trial, plaintiff read in evidence said note and closed.

The defendant read in evidence said bond and certain admissions of plaintiff, to-wit: that in 1862 defendant brought said negroes from Arkansas, when the Federal army overrun that State, to Georgia, that plaintiff filed a bill in equity in the Superior Court of Bibb County, Georgia, returnable to May term, 1864, enjoining the sale of said slaves by defendant, and praying that by decree of the Court, they should be sold and proceeds applied to the payment of what was due under said contract, which bill was pending till November term, 1865, when plaintiff dismissed it. It was also admitted that said slaves were in defendant's possession "till they were emancipated by the military authority of the United States in April, 1865," except a few that had died, whose loss was equalled by those that had been born.

Defendant also read in evidence the statutes of Arkansas, as follows:

Chapter 34, section 1, Code of Arkansas, page 254. "The common-law of England, as far as the same is applicable and of a general nature, and all statutes of the British Parliament in aid of or to supply the defects of the common-law, made prior to the fourth year of James the First (that are applicable to our form of government) of a general nature, and not local to that kingdom, and not inconsistent with the Constitution and laws of the United States, or the Constitution and laws of this State, shall be the rule of decision in this State, unless altered or repealed by the General Assembly of this State."

Chapter 117, sections 18 to 21, inclusive, of said Code.

"If any mortgagee, his executor, administrator or assignee, shall receive full satisfaction for the amount due on any mortgage, he shall, at the request of the person making satisfaction, acknowledge satisfaction thereof on the margin of the record on which such mortgage is recorded."

"If any person thus receiving satisfaction, do not, within



sixty days after being requested, acknowledge satisfaction as aforesaid, he shall forfeit to the party aggrieved, any sum not exceeding the amount of the mortgage money, to be recovered by action of debt, in any court of competent jurisdiction."

"Such acknowledgment of satisfaction made as aforesaid, shall have the effect to release the mortgagee and bar all actions brought thereon, or revert in the mortgagor or his legal representatives, all title to the mortgaged property."

"If such mortgaged property be redeemed by payment to the officer before sale, such officer shall make a certificate thereof and acknowledge the same before some officer authorized to take acknowledgment of deeds for lands, and such certificate shall be recorded in the office in which the mortgage is recorded, and shall have the same effect as satisfaction entered on the margin of the record."

Defendant closed. Plaintiff then read in evidence said bill of sale and closed.

Defendant's attorney requested the Court to charge the jury:

"1st. If the evidence shows the note, bond and bill of sale were executed at the same time and were about the same subject-matter, then the whole formed one contract, and they must be construed as making one entire contract.

"2d. If the evidence showed that the contract was made and to be executed in the State of Arkansas, then the laws of that State governed as to its interpretation, and that in failure of payment by defendant, the title and right of possession to the slaves became united and perfect at law in plaintiff, and being his, on emancipation the loss was his and not defendant's.

"3d. That the prosecution of this action, (if the proof be as stated in the charge above asked for,) is in violation of the amnesty proclamation of the President of the United States of May 29th, 1865, and plaintiff is not entitled to recover.

"4th. That if the proof be as above stated, then the prosecution of this action is in violation of the act of Congress known as the Civil-Rights-Bill, and the plaintiff is not entitled to recover.

"5th. That if the note in controversy was given for slaves, and the slaves have been emancipated, then the consideration has failed, and the jury will find for the defendant.

"6th. On the facts proved, plaintiff is not entitled to recover interest on this claim pending the civil war between the so-called Confederate States and the United States."

The Court refused to charge any of said requests except the first. He charged the first request, and that "the note sued upon may have been given for slaves and the slaves subsequently emancipated, yet such emancipation was the loss of the defendant and not of the plaintiff, and such subsequent emancipation formed no valid defence to this action."

The verdict was for the principal and interest due on the note, with costs of suit.

The errors assigned are the refusals to charge as requested, and the charge as given.

B. HILL, for plaintiff in error.

O. A. LOCHRANE, for defendant in error.

WALKER, J.

When this case was called, counsel for plaintiff in error stated that the points made in the case had already been decided against him by this Court, and he did not ask to re-argue them. He stated, as a reason for bringing up the case, that he desired to get it in a shape to enable him to carry it to the Supreme Court of the United States, and wished a judgment *pro forma* to enable him to do so.

1. Our reasons for affirming this judgment may be found in the cases of Hand vs. Armstrong, 34 Ga. R., 232; Freeman vs. Bass, ib., 355; and Bass vs. Ware, ib., 386. With the reasons then given and the points decided, we are fully satisfied, and reiterate the doctrines then enunciated. Subsequent reading and reflection have but strengthened our convictions of the correctness of the conclusions to which we then came.

As the counsel stated a satisfactory reason for bringing up

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Alfred vs. McKay.

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a case which he admitted had already been decided by this Court, we do not award damages against his client, as we otherwise would have felt it our duty to do. This is a power we hope we may not often be required to exercise; yet whenever we may think a cause shall have been brought up for delay only, we shall not be slow to visit the consequences on the party who may thus abuse the powers and processes of the Court. See Code, 4182.

Judgment affirmed.

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ALFRED, *alias* OLIVER ADAMS, negro, plaintiff in error, vs.  
WILLIAM MCKAY, defendant in error.

1. The mother of an illegitimate is entitled to its custody.
2. The Ordinary of the county of the mother's residence has no authority to apprentice an illegitimate without the consent of the mother, unless she be unable to support her child, or some other legal reason be shown why she should be deprived of the custody of it.

*Habeas corpus.* Decided by Judge VASON, Dougherty Superior Court, December, Adjourned Term, 1867.

This case was decided upon the petition and answer alone.

The petitioner claimed to be the master of Jesse Morris, a colored minor, aged fourteen years, he averred that said minor is the illegitimate child of the wife of plaintiff in error, born long before their marriage, that with the consent of the mother of said minor, petitioner took him into possession, and has kept him as a house-and-body-servant, greatly to the improvement of the minor, that he feels attached to said minor, and had, at the request and entreaty of the minor, and his election, had him bound to the petitioner as his apprentice by the Ordinary of said county, and that Oliver Adams had taken the minor out of his possession, intending to hire him out for gain, and then kept him restrained of his liberty, and prayed his discharge from said Oliver and restoration to petitioner.

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Alfred vs. McKay.

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MR ADAMS, for answer to the writ, said that the of said illegitimate " was, and for fifteen years had dent in said county, that the minor was over per- importune said McKay to have him bound to him, w anxious to live with his mother (Oliver's wife), minor never has been a charge upon any one except er, and is now able to support himself, and denies ishes the minor to work for him.

dge decided that the detention was illegal, and or- minor restored to petitioner.

intiff in error asks this Court to reverse said de-

GAN, for plaintiff in error.

. DAVIS, for defendant in error.

3, J.

ie Code, section 1750, the mother of an illegiti- titled to the possession of the child. Being the ized parent, she may exercise all the paternal is mother, the wife of plaintiff in error, has the : custody of her child, unless there exist some why she should be deprived of it. No such aged.

ant in error alleges that the mother consented ld take the boy as a servant, and at the minor's vas apprenticed to defendant in error by the Or- e county. The mother, it appears, had resided ty over fifteen years. How did the Ordinary iction of the person of this boy so as to authorize entice him without the consent of the mother? March 17th, 1866, (pamph. Acts, p. 6,) author- nary to bind out certain minors whose parents the county; also, all minors whose parents are port them. But neither branch of the statute s, applicable to this minor, and therefore the no authority to apprentice him. The mother

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McRae vs. Adams.

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resided in the county, and there was no evidence that she was unable to support him. Such being the facts, McKay acquired no right to the custody under this alleged apprenticeship, and the Court erred in ordering the boy into his custody.

Other reasons might exist why the mother should be deprived of the custody of her child, but none such are alleged in this record.

Judgment reversed.

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CHRISTOPHER McRAE, plaintiff in error, vs. WILEY ADAMS,  
defendant in error.

NOTE.—WARNER, C. J., did not preside in this case.

1. This Court has no original jurisdiction.
2. It is organized to correct the errors in law and equity from the Courts, it has no power to correct the errors committed by juries. Therefore, in a case where a verdict was rendered and no motion for a new trial made, but the case is brought to this Court on the grounds alone that the verdict was against the law, the evidence and the charge of the Court, a new trial will not be granted by this Court.
3. The law presumes that every officer will perform all his official duties.
4. If a party be dissatisfied with a verdict in the Court below, he should move for a new trial, and the ruling of the Court upon that motion is subject to review by this Court.
5. This Court will confine itself to the duty of correcting the errors of the Courts below, and will not usurp the powers which, according to law, belong to those Courts.

Ejectment. Tried before Judge FLEMING. Montgomery Superior Court. March Term, 1867.

This was an action of ejectment by Wiley Adams vs. Christopher McRae, for a field in said county covered by each of the grants herein mentioned. Plaintiff claimed under a grant to Abner Davis, for five hundred acres of Headright's lands, dated January 27th, 1820, and a regular chain of title

s to himself. Defendant claimed under a grant to Bryant for three hundred acres Headright land, —, 1821, and a chain of title from Bryant to par-whom he claimed to hold. There is no other description of the field in the record.

umentary and other oral evidence was submitted, they were charged by the Court, and rendered for the plaintiff for the premises in dispute.

on was made for a new trial.

assignments of error are that the jury found conclusion, contrary to law, and contrary to the charge.

DER W. DARLEY, (represented by JULIAN HART-plaintiff in error.

B. GAULDING and JONATHAN RIVERS, for defendant in error.

J.

having been rendered in the Court below, the error brings the case here upon the grounds alone that it is contrary to evidence, to the law and to the Court.

Court has no original jurisdiction, but is a Court of correction of errors in law and equity from the City Courts. Cons. Ar. IV. Sec. 1.

Court then correct an error of the jury? The law says it is a Court alone for the correction of the errors; that is, the errors of the Judges presiding in the Courts. Questions of law and equity are for the Judges, and it is their action which the Court should be the subjects of review by this Court. It has no power to review the action of the jury. *Vinkle*, 34 Ga. R., 339; *Ellington vs. Cole*, 425.

If a party in the Court below be dissatisfied with the jury, let him move for a new trial in that

Court, and if he be entitled to it, the law presumes it will be granted; for it is a presumption of law that every officer will perform all his official duties. 1 Kelly R., 5. *Mercy Ann Wright vs. the Ga. R. R. & Bk. Co.*, decided at June Term, 1866. Upon a motion for a new trial, the Judge will see to it that a correct brief of the testimony be made out, and his charge in full, as given upon the point complained of, incorporated; the opposite party will be notified, so that a hearing of the motion upon its merits will be had, and the reviewing Court will thus be fully informed as to the true *status* of the case in the Court below, and can mete out to each suitor the full measure of his legal rights. Of course, if the Judge in the Court below commit error in deciding a motion for a new trial, such error is one contemplated by the Constitution, and may be corrected by this Court.

The administration of justice will be more satisfactory to all, if the several tribunals keep strictly within the limits prescribed by law. This Court having no original jurisdiction, will confine itself to the correction of errors in law and equity from the Courts below; and will carefully avoid usurping the powers which properly belong to those Courts. We do not mean to say that we will not exercise the discretion confided to us by law, but we will confine ourselves to questions properly before us for review.

Judgment affirmed.

JACKSON, plaintiff in error vs. M. E. SPARKS, defendant in error.

On trial of a possessory warrant, the title to the property cannot be litigated; the Court must confine itself to the question of possession.

A exchanged mules with B, and B sold the mules received to C, who was an innocent purchaser, A cannot by a possessory warrant, recover the possession of the mule from C, by showing that he swapped to A a stolen mule for the one in controversy.

Writ of Habeas Corpus. *Certiorari*. Decided by Judge VASON, Superior Court. April Term, 1867.

The facts of this case were agreed to by attorneys for plaintiff and defendant.

The writ was in favor of E. W. JACKSON vs. M. E. SPARKS, a mule worth one hundred and fifty dollars, and was granted and tried before JAMES A. ANSLEY, Judge of the Court of Sumter County. A negro named Marion, eight days before the warrant issued, stole and carried off from one Hinton, another mule and traded it to JACKSON, presenting it as his own, for the mule in controversy. JACKSON shortly after claimed his mule and JACKSON gave it up. JACKSON without any knowledge of the larceny and fraud, took JACKSON's mule from Marion, and claims the right to it.

JUDGE ANSLEY decided that the mule should be restored to JACKSON.

The case was, by *Certiorari*, submitted to Judge VASON, who affirmed the decision of Judge ANSLEY, and ordered the writ to be granted to Sparks upon his giving bond for \$300.00 as required by the Statute.

The judgment of Judge VASON is assigned as error.

WILLIAM HUGH & GOODE, for plaintiff in error.

JOHN CAY, for defendant in error.



WALKER, C. J.

1. Upon the trial of a possessory warrant, the Judge or Justice shall hear evidence as to the question of possession in a summary way, without investigating the title to the property. Code, Sec. 3935. The object of the Statute was to quiet the possession of personal property, and not to try the title thereto. Under our laws a different tribunal has jurisdiction of questions relating to title.

2. The plaintiff voluntarily parted with the possession of the mule in controversy, and intended thereby to vest the title in the party from whom defendant purchased. Can this innocent purchaser, by possessory warrant, be deprived of the possession of the mule, because the title of the mule which plaintiff had received in exchange for the one in controversy, proved to be invalid? We think not. The language of the Statute is that the property "has been taken, enticed, or carried away, either by fraud, violence, seduction, or other means, from the possession of the party complaining." This cannot apply to a case where the "party complaining," voluntarily parted with the possession of his property in exchange for other property. This was an exchange of mules, and the plaintiff has his remedy against the negro on his implied warranty of title of the mule swapped to him. If the negro be solvent, as he may be for aught that appears, plaintiff can recover damages for the breach of warranty; if he be not, plaintiff must suffer the consequences of trading with an insolvent stranger.

Does not the Statute contemplate a wrongful taking of the property from the possession of "the party complaining?" and does not the fraud therein mentioned mean that the possession "has been taken" by fraud, and not that fraud may have been practiced to procure the assent of the owner? When it is remembered that the object of the Statute was to quiet the possession of property, without investigating the title, such would seem to be the legitimate construction of its meaning. Under the facts of this case we are very clear that the plaintiff should not recover the possession of the mule by this process.

Judgment affirmed.

BLACK, negro, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

A maxim of the common-law, that a man shall not be twice put to trial for the same offence.

of *autre fois acquit* is good only when the acquittal was on a indictment.

to determine whether an indictment is sufficient to sustain a conviction, would the judgment be arrested if the defendant were acquitted. If it would, a verdict of not guilty under it, would be valid; otherwise it would be.

A verdict of not guilty has been rendered in favor of a party, after a decision of the Court that the indictment under which he was tried, is too defective to admit testimony to be given in to convict; yet if that decision was wrong, and in fact, a conviction has been maintained under the indictment, such verdict and judgment when pleaded, will protect the party against a subsequent trial for the same offence. WALKER, J. dissenting.

to commit Larceny. *Autre fois acquit*. Decided by the COURT. Sumter Superior Court. April Term,

Wiley Black was charged with a misdemeanor, as follows: The said freedman, Wiley Black, on the ninth day of the month of June, in the year eighteen hundred and sixty-seven, in the County of Sumter, did then and there unlawfully and with force and arms, that the said Wiley Black, freedman, did, in and to the County of Sumter, on the day aforesaid, make an attempt to commit the offence of simple larceny, but did fail in the perpetration of such offence, for that the said Wiley did attempt to do so, and fraudulently, to take and carry away one hundred dollars, the property of Michael H. Stephens, the said dollars being the lawful currency of the United States, with the intent to steal the same, contrary to the laws of the said State, the good order, peace and dignity of the same.

When the jury was empanelled, and the Solicitor General read to the jury the indictment, and was about to introduce the evidence for the State.

Defendant's attorney objected to the introduction of the evidence "on the ground that the charge as laid in the bill of indictment, was too defective to admit of proof sufficient to convict."

This objection was sustained by the Court, and the jury then and there returned, on said bill of indictment, a verdict of not guilty.

By order of the Court said Black was held in custody, a new bill of indictment was found against him for the same offence, and upon this new bill he was put on trial.

Defendant plead *autre fois acquit* and relied upon the first bill of indictment and the verdict thereon to sustain the plea. The Solicitor General demurred to the plea. The demurrer was sustained by the Court.

The defendant was convicted on this second bill of indictment and fined fifty dollars and costs.

The error assigned for review is, sustaining the said demurrer, and ordering the defendant to be tried on this second bill of indictment.

SAMUEL C. ELAM, COBB & JACKSON, for plaintiff in error.

N. A. SMITH, Solicitor General, for the State.

WALKER, J.

Wiley Black was indicted for an attempt to commit larceny; and pleaded not guilty. A jury was empanelled, and the first witness for the State placed on the stand. Before any testimony was given in, defendant objected to the introduction of any evidence, "on the ground that the charge, as laid in the bill of indictment, was too defective to admit of proof sufficient to convict." The Court sustained the objection, and permitted the jury to render a verdict of not guilty. By order of the Court, Black was held in custody, a new bill for the same offence was found, and the next day defendant was again arraigned and pleaded *autre fois acquit*. This plea was overruled by the Court, and upon the issue of not guilty,

it was convicted, and brings the case up, alleging error resulting of his plea.

The provision incorporated in our constitution, that no man shall be subject, for the same offence, to be twice put in jeopardy of life or limb, is much older than the constitution. It was deeply imbedded in the common-law. In *Wethersby*, 4, Rep., 40a, decided in the 28th year of Elizabeth, it is held that "a man's life shall not be twice put in jeopardy for one and the same offence." In *Vaux's case*, Ib., 3d Elizabeth, it is said: "The maxim of the common law is, that the life of a man shall not be twice put in jeopardy for one and the same offence," and that is the reason why *autre fois* acquitted, or convicted, of the same offence is a good plea.

This is a leading case, and in addition to what is already decided, it decides that "the plea of *autre fois acquit* is a good plea when the acquittal is upon an indictment sufficient

to determine whether an indictment is sufficient. It would the judgment be arrested if the defendant is found guilty under the indictment; if it would, a verdict of acquittal would be no protection, because the indictment is insufficient in law; otherwise it would be a protection as expressed by Wharton, Am. Cr. Law, 193: "If a man could have been legally convicted upon any evidence which might have been legally adduced, his acquittal on a second indictment may be successfully pleaded to a second indictment and it is immaterial whether the proper evidence was adduced at the trial of the first indictment or not." *Peotett & Ward*, 1 J. R., 66-77; 3 Greenl. Ev. Sec. 454.

By Sec. 4516, an indictment shall be sufficiently good if it states the offence in the language of the Code, and that the nature of the offence charged may be understood by the jury. By Sec. 4517, no motion in arrest of judgment shall be sustained for any matter not going to the real merits of the offence charged in the indictment.

ment. Tried by these rules, we think the first indictment preferred in this case, sufficiently technical ; provided the case is in a condition that we have the right to express an opinion upon its sufficiency.

In the propositions here laid down we all concur ; the difference between us arises as to the application of these principles to the facts of the case.

4. By whom shall the sufficiency of the indictment be determined ? My associates say, that when a verdict of not guilty has been rendered in favor of a party, though under a decision of the Court that the indictment upon which it is rendered, was insufficient to sustain a conviction, yet if that decision was wrong, and in fact a conviction could have been maintained, under the indictment, such verdict and judgment, when pleaded, will protect the party against a subsequent conviction for the same offence ; that in law, the party really was in jeopardy, though it was erroneously held that he was not ; that the question upon the validity of the indictment must be determined by the Court when the record of acquittal is introduced ; and the judgment, showing upon what ground the verdict was rendered, cannot be given in to affect it ; that though the verdict be rendered without any evidence, upon the motion of the defendant, upon the ground that the indictment is insufficient, yet when he pleads it as an acquittal of the offence, he may insist that he induced the Court to commit an error, and that the indictment was good, and he entitled to be discharged from further prosecution. These I understand to be the views of the majority, and accordingly they reversed the judgment of the Court below.

From this judgment I dissent, for the reason that I think the defendant was not "lawfully acquitted." In Vaux's case it is said that the defendant must be lawfully acquitted. I have examined many cases on this subject, and I find that in very many of them, the parties had been tried upon the merits—indeed, this appears to have generally been the case. Some were decided upon special verdicts, but this I apprehend differs little from general verdicts. In some of the cases the juries, failing to agree, had been discharged without the con-

sent of the defendants. In most of the cases, the subsequent trials were predicated upon the omission of some material allegation in the first bill of indictment. Vaux's case, Barrett & Ward's case, Sheep's case, *supra*; The King vs. Emden, 9 East. R., 437; The King vs. Clark, 1 B. and B., 473; (5, E. C. L. R., 748) Rex vs. Birchenough, 7 Car. & P., 574; (32, E. C. L. R., 766). I think I have not found a single case where a party has been allowed to take a verdict because the indictment was defective; that it has been held a protection against a subsequent prosecution. On the contrary, I think both reason and authority are the other way.

The old rule permitted the prosecuting officer to *Nol. Pros.* at pleasure. This often worked great hardships upon defendants, and our penal code remedied this evil by taking away from the State the power to *Nol. Pros.* a bill after the case had been submitted to the jury; and to guard against acquittals on mere technicalities, required all exceptions which go merely to the form of the indictment to be made before trial; and all demurrers and special pleas to be made in writing, so that the prosecuting officer should be notified before submitting the case to the jury. Such are the remedies provided by the Code. After the case has been submitted to the jury no exception can be taken to the indictment, except such as would be good in arrest of judgment. "Motion for a verdict for a defect in the indictment, is in effect a demurrer." Jordan vs. The State, 22, Ga. R., 556. Here the defendant moved to take a verdict because of the insufficiency of the indictment. The Court, before whom the case was proceeding, sustained the motion and adjudged that the indictment was insufficient. That was a Court of competent jurisdiction, and its judgment stands in full force. By what means does this Court, in a collateral way, obtain authority to review that decision, and in effect reverse it? I know of no such authority. In 2 Leading Cr. Cas., 554, it is said, "if the former trial resulted in a verdict of guilty, but upon an indictment so defective that no valid judgment could be pronounced upon it, and none has been pronounced, it is no bar to a subsequent prosecution. Citing authorities. And this is said to be so although

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Black vs. The State of Georgia.

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judgment was arrested on the first indictment for an insufficient cause; *for it having been done on the defendant's own motion, he cannot be allowed to impeach it.*" 3 Scammon, 363. In *The People vs. Casborns*, 13 J. R., 350, the Supreme Court of New York, says: "The defendant on his arraignment pleaded that he had before been tried and convicted for the same felony; that upon his motion, the judgment had been arrested, and that he had been discharged from that judgment. It is admitted that the former and present indictment are in every respect similar. To this plea the District Attorney demurred; the plea was overruled, and the defendant was thereupon tried and convicted, and sentenced to imprisonment in the State prison. It was decided in *The People vs. Barrett and Ward*, 1 J. R., 66, that a person after acquittal, might be indicted and tried the second time, if the first indictment was erroneous, so that no good judgment could be given upon it; and when a Court of competent jurisdiction arrest a judgment, *at the instance of the defendant, it must be intended, legally, that the indictment was vicious*, for the judgment cannot be reviewed on a writ of error; as an arrest of judgment is a mere refusal, on the part of the Court, to give judgment, every Court is bound to pay that respect to a Court of co-ordinate jurisdiction as to presume its judgment to be according to law, when it is presented for consideration collaterally. It is stated here that the two indictments are in every respect similar; but this is not so pleaded, and if it had been, the consequence would be the same; as already observed, in this collateral way, we must presume, from the judgment being arrested, that the indictment was erroneous, and if erroneous, then a conviction would not bar another good indictment. It is in vain to say either that the former indictment *was good*, or that this being like it, must be holden to be bad also, because the other was adjudged to be bad. We must take it as a *settled point* that the other indictment *was bad, however the fact may be*; and we are not to be told that this is a bad indictment, merely on the authority of the sessions. We must see if it be bad and this is not even pretended."

I have made this long quotation from the opinion delivered

by Justice Spencer, because the reasoning of that able Judge sustains my position. Although it was not pretended that the first indictment was bad, yet as a Court of competent jurisdiction had so decided, it was a "settled point" that the indictment was bad "however the fact may be." And so I insist in this case. In that case, stress was laid upon the fact that the judgment was obtained on the motion of the defendant. It was not for him to say that it was erroneous. He was concluded by the judgment in his favor, rendered at his instance, and from which there was no appeal.

The judgment, as to the insufficiency of the indictment against Black, was a judgment against the State, and which could not therefore be carried up for review. It was a final judgment upon the question made; and that question was whether the indictment was sufficient or not. It was a judgment of a Court of competent jurisdiction and stands in full force.

I am not willing, nor do I think this Court has the authority, in this collateral way, to obtain jurisdiction, and review the decision of the Court below. I now lay out of view entirely the question whether the first indictment was sufficient or not; it is enough, in my judgment, that a Court of competent jurisdiction so decided, and that judgment remains in full force. I never have been able to see how a party could obtain a valid acquittal upon a decision of the Court that the indictment is too defective to sustain a conviction. How a party who asserts that an indictment is too defective to sustain a conviction, and induces the Court so to decide, can be heard to insist that the indictment was good after all, and that a verdict rendered thereon, and in consequence of such decision, was conclusive of his innocence, I cannot understand. The indictment was adjudged to be too defective to admit proof under it of guilt; but when guilt is about to be proved, under an indictment admitted to be good, the defective indictment, with the verdict of acquittal, is sufficient to exclude the proof of guilt and so shield the guilty from punishment. I think the law works no such inconsistencies; and I therefore dissent from the judgment rendered in this case.

Judgment reversed.



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Williams vs. Waters.

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**JAMES WILLIAMS**, plaintiff in error, vs. **JAMES L. WATERS**,  
defendant in error.

1. When one party seeks to recover damages for a violation of a contract, the other party may show that plaintiff has not complied with his obligations under the contract, and, in good conscience, is liable to defendant.
2. There being degrees in secondary evidence, an examined copy should be received in preference to oral testimony, and the best evidence should always be produced.
3. The well established rule of law is, that parol evidence is inadmissible to add to, take from or vary a written contract.
4. The construction of an unimpeached written contract is a question for the Court, whose duty is to ascertain the intention of the parties, if possible, and enforce the contract according to its terms and stipulations.

*Certiorari* from the County-Court. Decided by Judge VASON. Dougherty Superior Court. May (adjourned) Term, 1867.

James L. Waters and certain freedmen farmed during eighteen hundred and sixty-six, in Dougherty County. Plaintiff in error and his wife were two of those freedmen. Differing about their contract, Williams, in behalf of himself and wife, sued Waters in the County-Court, to compel compliance with the contract. General issue, set-off and payment were considered as plead.

A trial was had before a jury.

Plaintiff, introduced in his own behalf, testified: that he and other freedmen made a contract with Waters at the plantation, that they came to town and signed a written contract, in Judge D. A. Vason's office and in his presence, that they took the contract to the agent of the Freedmen's Bureau and he approved it, that the contract was left with said agent, that the agent gave Waters a copy of the contract, that witness had made several applications for the original contract, but had been unable to obtain it, being informed that it was sent to the headquarters of the Bureau.

W. E. SMITH, one of plaintiff's attorneys, testified: that

written several times to the headquarters of the Bureau at Savannah, but had received no reply. Upon this motion, plaintiff's attorneys proposed to prove the contents of the contract. Objection was made on the ground that the execution of the contract must first be proved by the living witnesses.

The objection was overruled.

Plaintiff then introduced as a witness, Judge D. A. VASON, who testified: that he drew a contract between Waters and the freedmen, and explained the contract to the freedmen in relation to the rent of the land, hire of mules, etc. Witness was in that all the freedmen were present. Witness told them he thought it a good contract for them.

Witness's recollection of the contract was, that it was in the form of a partnership, that Waters furnished the land at a value of \$2,000 which was to be returned at the end of the year in corn and fodder, eight mules at a hire of \$25 each, and a man at a hire of \$25, and plantation tools at a hire of \$25. Waters was to furnish the rations for the freedmen, and the freedmen were to pay for them, the freedmen were to labor on the plantation and obey the orders of Waters, and at the end of the year, after paying expenses, the balance of the crop was to be equally divided, Waters taking one half and the freedmen the other half.

Witness also stated that he knew the plantation, that about 100 acres of it was open, and that it would have been worth five dollars per acre in eighteen hundred and sixty. Witness also stated that the paper submitted to him by defendant's attorneys, was in substance, a copy of said contract. The contract was again introduced in his own behalf. He testified that he signed the contract in the presence of Judge VASON in his office, but that the contract was agreed to by the freedmen at that time, that when he came to town the contract was taken up, he and the other freedmen signed it and it was returned to him; that by the contract which he and the freedmen made, they were not to pay anything for rent or hire of mules, wagons or plantation tools, that Waters was to furnish them so and said he was to furnish these without

rent or hire; that these terms were agreed upon at the plantation before signing the contract in town.

This evidence, as to the terms of the contract, was objected to and the objection overruled.

Plaintiff further testified: that after paying back to Waters all the corn and fodder used, that there remained for division fifteen hundred bushels of corn, five double stacks of fodder, eight and a half barrels of syrup, sixty bushels of potatoes, a stack of oats, and thirteen bales of cotton weighing each five hundred pounds; that there were fifteen hands, and witness was entitled to two shares (for himself and wife); that he never authorized Waters to pay the bills of Drs. Jennings, Connally and Cromwell, but witness owed said physicians an account; that Waters was to pay six dollars to the freedmen for harvesting the wheat, that he had paid witness twenty dollars for produce sold.

JACK, LANCASTER, ELBERT, SAM and ABRAM, other freedmen who had signed said contract with plaintiff, were then examined by him.

They testified: that they signed the contract in the presence of Judge Vason, at his office; that all of them went with Waters, with the contract, to the Freedmen's Bureau, that the agent approved the contract and said it was a good one, the agent handed Waters a paper, saying it was a copy of the contract; they were not to pay rent for the land, hire of mules, wagon or plantation tools, but Waters was to furnish them, and after paying back corn and fodder and provisions furnished by Waters, and the blacksmith's bill, the balance was to be equally divided between Waters and the freedmen, Waters taking one half and the freedmen the other half; that Waters took one of the field hands to cook for his family.

They all corroborated plaintiff's statements as to the quantity of produce made; two of them testified that the contract was not read to them by Judge Vason, the others that it was, and two stated that the contract was read to them by the Bureau agent, and the others that it was not.

Defendant proposed to prove by these witnesses, that the

have been larger, had the freedmen worked faithfully. Court refused to allow this. Plaintiff closed.

testified in his own behalf: that the copy conveyed was a true copy of the original, that the same was approved by F. A. Billingslea, Bureau-agent, who had made a good contract for the freedmen, that Judge had signed the contract for him because the freedmen would not do so, and that the contract was, the freedmen to pay one-half of the rent of the land, hire of mules, and plantation tools mentioned in the contract; and under the oral contract, the freedmen were to furnish a cook, and to share equally with them in the division of the crop. The freedmen's share of the corn was about six bushels; that they had sold two loads, about sixty bushels, and that he had paid plaintiff several dollars for the aggregate \$———.

The attorneys then read in evidence the copy conveyed, and said:

*Lougherty County.*

Waters has this day made the following contract with assigned freedmen. The said Waters furnishes to the freedmen four hundred acres in cultivation, which is valued at \$1,000; fifteen hundred bushels of corn, valued at \$1,500; 10,000 pounds of fodder at \$1,000; eight mules, the hire of which is valued at \$25, to be replaced if one dies or is lost; one two-horse team of which is valued at \$25, to be returned in good order. The freedmen are to furnish the plantation tools, ploughs and gear, the use of which is valued at \$100. They are to do all work assigned to them by the said Waters or his agent, and for unpaid wages to be discharged,—to begin this day, and end December, 1866.

Waters furnishes also rations for the freedmen, all of which are returned to him at the end of the year, and the freedmen are to pay one-half of the expenses of the crop, one-half of anything else that may be furnished to them, other than mentioned above, and the crop

that may be made (except the wheat) corn, fodder, cotton, potatoes, etc., shall be equally divided between the said freedmen by disinterested men, and the said Waters to have the other half.

In witness whereof, they have hereto set their hands, this 1st January, 1866."

This contract purports to be signed by the marks of the freedmen, for themselves, their wives and children, tested by "J. B. Brinson," and endorsed "Bureau R., F. and A. L., Albany, Jan'y 1st, 1866."

After argument, the jury returned a verdict for plaintiff for \$69.46.

Upon this a *certiorari* was taken. The *certiorari* was sustained and a new trial granted, because the Court below refused to allow Waters to prove that plaintiff was an unfaithful servant, etc., and because he admitted the oral evidence to contradict the written contract.

This granting of a new trial was assigned as error.

STROZIER & SMITH, for plaintiff in error.

WRIGHT & WARREN, for defendant in error.

WALKER, J.

1. The Court did right to grant a new trial in this case. The County-Court erred in refusing to allow evidence to show that plaintiff had not complied with his contract. Defendant has the right to reduce the amount of plaintiff's claim, if he can show that by a failure of the plaintiff to comply with his part of the contract, the defendant suffered loss. If plaintiff failed to work as he contracted to do, he is not entitled, in good conscience, to as much as he would be if he had performed his obligations. Code, sec. 2850 and 2853.

2. There are degrees in secondary evidence, and the best should always be produced. Code, sec. 3691. A sworn copy should be received in preference to verbal testimony, to prove the contents of a written contract. The copy certified by the

the "Bureau," in the absence of the original, is the only evidence, and should exclude oral testimony if the contract was; unless the written contract can be proved by some of the modes known to the law, such as copies, etc.

A well established rule of law is, that parol evidence is not admissible to add to, take from or vary a written contract. 2721. Therefore a contract reduced to writing, and signed by the parties, should be enforced according to its tenor, unless there is an ambiguity in it. If there be an ambiguity in the written contract, it may be explained; 729.

The construction of a written contract is a question for the Court, Code, sec. 2718; whose duty it is to ascertain the intention of the parties, and enforce the contract irrespective of the rules. If, as it would seem from the evidence, a copy of which was before the Court, was signed by the parties, the duty of the Court is to construe it, according to all the parties their rights respectively. The Court looks to the language of the contract, and the Court enforces its stipulations. We deem it not improper to enforce the rights of the parties, as the facts now appear to be determined by the writing, the certified and sworn copy of which was before the Court; and the original was retained to the parties, both by Judge Vason and the "Freedmen's Bureau." This is much better evidence of what the contract was, than the interested statements of the parties, made after they had become involved in

affirmed.

THE MAYOR AND ALDERMEN OF SAVANNAH, plaintiffs in error, vs. THOMAS J. CHARLTON, defendant in error.

NOTE.—WARNER, C. J., did not preside in this case.

1. When a physician is licensed by the authority of the State to practice medicine, the city of Savannah cannot require him, under a penalty, to take out license before he can practice his profession in the city.
2. The practice of his profession in the city is the subject of taxation by the corporation, but not of a license.

Licensing power of Mayor and Aldermen of Savannah. *Certiorari* from Chatham Superior Court. Decided by Judge FLEMING. January Term, 1867.

Dr. Thomas J. Charlton, a physician in Savannah, Georgia, was fined by the Mayor \$100.00 for practicing without a license.

By his petition for *certiorari* the following facts were set forth: That defendant in error is a practicing physician in the city of Savannah, county of Chatham, Georgia, and was such prior to January 1st, 1863, and entitled to practice, by virtue of a diploma and a license from The Savannah Medical College, incorporated by the General Assembly of Georgia, with power to license its graduates to practice in the State of Georgia, and also by virtue of an act of the General Assembly of the State of Georgia, approved 9th March, 1866, being amendatory of § 1350 of the new Code of Georgia; that defendant was on the 12th February, 1867, brought before the Mayor of said city, charged with violating the 3d Section of an ordinance of said city, passed 26th December, 1866, which provides that every physician shall be compelled and required to take out a license annually, on the first day of January, or within ten days thereafter, and independently of the income or commission tax, to pay therefor fifty dollars; and on failure to take out such license, such person shall be fined, on conviction, one hundred dollars for each day's default; that he was fined by the Mayor \$100.00 for practicing in the city without a license from the city, and

aled to the City Council, who confirmed said

ments in the petition being admitted to be true, to the *certiorari* waived, the case was argued on and law alone.

reversed the sentence, on the grounds that the Aldermen of the city of Savannah had no authority to require defendant to take out such license, that a license is a tax on person or property, but a sale by the city of permission to do that which, without such license would be illegal, and that the 3d section of said act is in conflict with the act of the General Assembly, passed March, 1866.

Judge in error assigns said judgment and the proceedings laid down by the Judge as error.

J. HARDEN, HENRY R. JACKSON, for plaintiffs

E. LLOYD, HARTRIDGE & CHISHOLM, for defendant.

J.

The laws of the State, defendant in error was licensed to practice medicine anywhere in the State. The Council of the city of Savannah passed an ordinance among other things, ordained that every physician in the city shall be compelled to take out license annually, on or before the first of January, or within ten days thereafter, for which he shall pay fifty dollars. On failure to take out such license, the person shall be fined, on conviction, one hundred dollars for each day's default. If no property of the defendant is found out of which to raise said fine money, he shall be imprisoned. The defendant says the city has no authority to require him to procure a license, the Court refused to grant it, and the city brings up the case for review. Is the license? It is defined to be a right given by the city without authority to do an act which, without such



authority, would be illegal. *Bouv. L. D. in locis.* The position of the city, then, is that, notwithstanding Dr. Charlton has license from the State to practice medicine anywhere in the State, yet if he exercises the privilege thereby granted, in the city of Savannah, without a license from the city, it will be illegal. In other words, if he acts under the license from the State, he becomes a criminal. The effect of which is to elevate the ordinance of the city above the laws of the State.

But it is insisted that the city has authority to tax this physician under the law—Code, Sec. 4756—and that the license-fee is a mere tax, and the paper called a license a receipt for the money, that this really is a contest about words merely, and substantially there is no difference between a license and a tax. We cannot assent to this. A tax is a rate or sum of money assessed on the person, property, etc., of the citizen, while a license confers a privilege, and makes the doing of something legal, which, if done without it, would be illegal. Under the name of a license, Dr. Charlton cannot be prohibited from availing himself, in the city, of the privilege conferred on him by the State.

2. He is not here contesting the authority of the city to tax him for practicing his profession ; what he contends for, is that the city shall not make that illegal which by the law of the State is legal. We see no good reason why the city may not tax the practice of any profession within the corporate limits. We might elaborate, but deem it unnecessary. Judge FLEMING decided this case correctly.

Judgment affirmed.

*roe, ex dem., &c., vs. Roe, cas. ejector.*

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*ex dem.* of JOHN HOLLIS, ALEXANDER STEWART, S. ZACHRY, W. G. KOLB, and ABNER PARTIS, *vs.* RICHARD ROE, *cas. ejector*, C. STEVENS, tenant in possession, defendant in

of ejectment, a registered deed for the premises in dispute is admissible in evidence, without further proof, unless an affidavit is provided for by the Code, section 2674.

to attack a deed for forgery, by any competent evidence, is to be read to the jury.

to be filed as provided by for the Code, the deed cannot be taken into evidence until an issue as to its genuineness be tried.

the right to give in such competent evidence as he may see fit to produce proof sufficient to satisfy the minds of the jury. It should not be told that the use of the evidence introduced, or certain other testimony which the opposite party insists upon, is a stronger circumstance against the party intro-

*in* *libi* of the alleged maker of a deed at the time it bears the signature of impeaching it; and such testimony is admissible for the purpose of satisfying the minds of the jury that the deed is a

Motion for new trial. Decided by Judge R. Superior Court, November Term, 1866.

Ejectment for land, lot No. 399, in the 11th District, formerly Early, now Baker County.

Proceedings on the trial was as follows:

Plaintiff first accounted for the original grant, read the copy. The lot was granted to John Hollis, of Edgeville, S. C., on the 10th November, 1829:

Hollis to Alexander Stewart for said lot, dated 30th, recorded 18th February, 1839:

Stewart to Lewis Zachry, dated 29th March, 1839, and February 18th, 1839: (Both of these two deeds were drawn from defendant's possession:)

Zachry to William G. Kolb, made in Campbell County, Georgia, 24th December, 1840, in presence of Addis and Valentine Kolb, and probated by Valentine

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Kolb before Henry Paselet, J. P., on 26th December, 1840, and recorded 9th February, 1854 :

Deed from William G. Kolb (of the State of Texas) to Abner P. Parrott, of Campbell County, Georgia, on the 9th July, 1852 : (This deed purported to have been made in Cobb County, Georgia, and its consideration expressed was \$500.00 :)

NORRIS SMITH testified that Stevens was in possession of said lot (by witness as his tenant) when the suit was commenced. Smith also testified as to the value of said lot for rent, (as did also one Henry Slappy,) but that testimony is not important.

Plaintiff here rested his cause. Defendant introduced the following evidence :

Deed from Lewis Zachry to William Kolb for said lot, made 2d March, 1841, in Campbell County, Georgia, in presence of Martin Kolb and William Bomer, Justice of the Inferior Court, recorded November 23d, 1852 : (The consideration expressed in this deed was \$500.00, and the deed had this endorsement upon it : " This is a forged deed, this 24th April, 1854 ; Lewis Zachry. Attest, A. W. Conyers, Clerk Superior Court :")

Deed from William Kolb to Manly W. Ford, for said lot, made in Walker County, Georgia, on 9th June, 1850, consideration \$400.00, in presence of John Day and E. R. Sassen, recorded 24th November, 1852 :

Deed from Manley W. Ford to Seth C. Stevens, dated 8th November, 1852, consideration \$250.00, made in Baker County, Georgia, in presence of William H. Bassett and Littleton Phipps, probated by Bassett before Green Tinsley, J. L. C., 13th November, 1852, recorded 24th November, 1852 :

The plaintiff, in rebuttal, read in evidence the certificate of the Secretary of State, that, as appears by the records of that office, the Justices of the Inferior Court of Campbell County, Georgia, from the 10th January, 1837, to the 1st January, 1842, were as follows :

Joseph Camp, Joseph Jay, James McKay, Robert C. Be-

adrack Green, were commissioned 11th January,  
 Kamp and Berryman Kamp, 19th February,  
 as Rice and Alexander McLarty, 21st January,  
 D. Smith, Alfred G. Camp, Thomas S. Rice,  
 , and Robert O. Bevers, 14th January, 1841:

ories of LEWIS ZACHRY (to which were attached  
 m Parrott and the deed from Lewis Zachry to  
 b, dated 2d March, 1841, under which Stevens  
 ind, and a deed from Zachry to Kolb, dated 24th  
 1840, aforesaid) were next read by plaintiff:

l that he did not know Stevens, that he did not  
 ver made the last deed attached, for the hand-  
 s signature is a better hand by far than he ever  
 he did make a deed to the lot mentioned in  
 William Kolb, (or William G. Kolb, which was  
 me he did not recollect,) that if he ever made  
 e such deed he did not remember it, and did not  
 and for the reason aforesaid did not think he  
 the last deed attached; that he did not know  
 n Kolb lived in 1852, that he first saw him in  
 40, at his brother's (Martin Kolb's) Campbell  
 gia; then sold him said land and did not recol-  
 ve seen him again, except in March, 1842, at  
 ce; that William Kolb then said he lived in  
 y, Georgia; that witness never lived in Camp-  
 Georgia, but happened at Martin Kolb's on a  
 ne; that he knew no man in Campbell County,  
 d Bomer, and knew nothing of the officers of  
 hat the deed from witness to Kolb, dated 24th  
 1840, is genuine, because witness wrote it himself.  
 unction, he stated that he made the endorse-  
 ed aforesaid because, after a careful examina-  
 d, he was satisfied, for the reasons aforesaid,  
 t sign it; that he had had no communication  
 ants of this land, except that they sent to wit-  
 tion the deed dated 24th December, 1840; that  
 eds before him, not remembering that he made  
 fied one is genuine and the other as aforesaid

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is a forgery; that Kolb gave him two lots of land in Walker County for said lot, the numbers of said two lots he did not recollect; that he did not recollect making second deed upon Kolb's representing that the first was lost; that he saw Martin Kolb write about the date of this deed, but did not know his hand-writing well enough to swear to the signature, nor whether or not it was like his signature; that he knew nothing at all about Bomer, did not know him, and if he ever saw him write did not know it; William Kolb was sometimes called William and sometimes William G., and was Martin Kolb's brother; report said that William ran away for murder; that he knew Martin Kolb, who then resided in Campbell County, and for truthfulness he stood, as far as witness knew, as fair as any man; that he knew nothing of the opinions of Martin Kolb and John W. Edge, and knew not why they were selected as witnesses. (21st August, 1857.)

WILLIAM G. KOLB, whose interrogatories were executed in Freestone County, Texas, testified that he did not know Seth C. Stevens, but had known Lewis S. Zachry; that he had a release by Abner B. Parrott from his warranty in the deed aforesaid (which deed was attached to these interrogatories); that he never deeded said lot to any person but A. B. Parrott; that he left Georgia in the winter of 1845, to the best of his recollection; that he believes the annexed deed is the one he made to Parrott; that he considered he owed Parrott for services rendered, (how much he did not know,) and with it, a desire to bestow something upon his daughter, Parrott's wife, was the inducement which caused him to make the deed; that he was living in Freestone County, Texas, and was there on the 9th June, 1850.

ALZADA KOLB and PETER M. KOLB answered interrogatories in McLeman County, Texas.

ALZADA testified that she was well acquainted with Abner B. Parrott and William G. Kolb; that said Kolb was in 1850 living in Limestone or Freestone County, Texas, and on the 9th June, 1850, was at home, or near about home; that he moved from Coweta County, Georgia, to Texas in

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he recollected his being at home 9th June, 1850, that of there being some sickness in the family at

ified that William G. Kolb was his father, and went to him from his earliest recollection; that his father was residing in Freestone County, Texas, and was in June, 1850, that he lived but one mile from his father's home, that his father was a candidate for Justice of the Peace at the election to be 1st of August, 1850, and his father was at home two months or more before said election, and he moved from Coweta County, Georgia, to Texas

so read interrogatories of EZEKIEL HIGDON, and CHARLES SHELTON, taken in Freestone County, Texas.

more that William G. Kolb lived in Freestone County, Texas, in 1850, and his impression was that he was in June, 1850.

HIGDON swore that he did not know where William G. Kolb was on the 9th June, 1850, but that Kolb was in Freestone County, Texas, in 1850, that witness was in Freestone County, Texas, and saw Kolb at witness' house in June, 1850, and never heard of Kolb's being in Freestone County during said month.

SHELTON swore that William G. Kolb was in Freestone County, Texas, in June, 1850, and though he did not know where he was in Freestone County, Texas, on 9th

EDGE, of Campbell County, Georgia, in behalf of himself testified that he had no recollection of ever seeing William Kolb to Manly W. Ford to said deed, that he knew nothing of the deed referred to; that he did not see Kolb sign his name but once or twice, but that he saw his name signed to letters purporting to be a deed, that he knew nothing of Manly W. Ford of his person, but by reputation said Ford was an honest man, and easily imposed upon, and totally insolent, and that he once saw a deed purporting to be a deed from

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Lewis Zachry to William Kolb, of Campbell County, Georgia, the date of the deed he did not remember, but it was witnessed by Martin Kolb and one Bomer, as Judge of the Inferior Court; that William G. Kolb never resided in Campbell County, Georgia, but he resided in Meriwether and Coweta Counties, in Georgia, for several years before he moved to Texas; that he was not a blood relation of said Kolb, but married his niece in 1847.

Plaintiff closed. Defendant replied as follows:

ABNER B. PARROTT, by interrogatories, testified that he received a deed from William G. Kolb for said lot for sundry services rendered him; that witness married Kolb's daughter; that this suit is not pending for benefit of Kolb, and a recovery will not benefit Kolb; that he was not Kolb's security, nor did he hold the deed to save him from loss; that Kolb owes him nothing, and witness is not responsible for any criminal charge, nor has had anything to pay on any bond for Kolb; that he has had nothing to do with any prosecution against Kolb, knows nothing of any such prosecution being abandoned; that he was under no liability for Kolb, and Kolb had owed him nothing since said deed was made.

Interrogatories for EDWARD R. SASSEEN (to which was attached the said deed from Kolb to Ford) were to this effect: His signature as J. P. to said deed was genuine, he believed, because it resembled his writing at that time, and because he then signed his middle name with a small "R"; and because he often signed his name hurriedly, without taking up the pen from the paper; he was a Justice of the Peace in Walker County, Georgia, from sometime in fall of 1849 to fall of 1852; he does not recollect whether he ever knew John Day or William Kolb, or how they looked; he was keeping hotel in a public place in 1850, and frequently witnessed deeds for strangers; he never knew Manly Ford or his character; he had some doubt about the genuineness of his signature, but it was like his signature at that time, and he believed it was genuine:

ers from LEWIS ZACHRY in these words :

“ COVINGTON, *August 20th*, 1857.

TH C. STEVENS OR HIS ATTORNEYS : Some days called upon as evidence in Baker Superior Court to take interrogatories about two deeds that the same lot of land—399, in 11th District of now Baker County. Since my evidence was looking over my papers for a lost note of hand, I memorandum book, in pencil writing of my own hand, about the two deeds, which had slipped my recollection. So if you will have another set of interrogatories and sent to me, I will have them filled out and to you as early as possible, as it will set every year as day on that subject. I have written to Warren, at Albany.

“ So I remain yours,

LEWIS ZACHRY.”

“ COVINGTON, *September 13th*, 1857.

YON, Esq.:—I this morning received a letter from Stevens, stated that you were his attorney in the case of two deeds, and requested me to inform you of the deeds had made since the taking of the interrogatories. I found an old memorandum book, that I find in pencil writing of my own hand-writing, in these words : ‘ W. G. giving my deed with him when he goes with his daughter, as I have made him another deed, this 11th.’ This is my recollection of the memorandum. I am writing from recollection without having the memorandum before me; but on finding the memorandum, it confirmed my recollection about the deeds, as I gave him, a legal plot and grant when we traded. So I am of opinion justice should be done in the premises,—so I think the sides should know all that I recollect about the

“ So I remain yours,

LEWIS ZACHRY.”



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Seth C. Stevens executed a release to Lewis Zachry, attached said supposed forged deed to another set of interrogatories, and Zachry answered them. These last interrogatories were in substance, as follows: From the signature *alone* of this deed, witness would say, without much hesitation, that it was not genuine, but from circumstances discovered since testifying before, he is inclined to believe that the deed is genuine. He then related that Warren showed him this deed with the other interrogatories, that he had possession of it before, that he had sent it to Martin Kolb, asking if his signature as a witness, was genuine, and that Kolb said it was not, and he then showed the deed to intimate friends and persons acquainted with his hand-writing, who said his signature was not genuine, and from these circumstances, being satisfied that his name was forged thereto, he made the said endorsement; that he thought no more of it till he answered said first set of interrogatories and reiterates the statements in said letters as to finding the memorandum, etc. He then proceeds to state that after he made the first deed, William Kolb, at Martin Kolb's house, asked him to make a deed, he replied that he had done so, and given him the plot and grant; that William Kolb said if he had had such deed it was lost, and witness then made him another, with the understanding that if he found the first one, he would return the last when he went to Augusta with cotton.

He further said that although this signature was not his *apparently*, since he was refreshed he did not doubt that it was his, and in substance, in answer to cross-interrogatories, admits that he swore as stated in former interrogatories, but thinks he was then mistaken; that he wrote to the parties to let them know the facts; that he had often seen Martin Kolb write, then thought and still thinks the letter he got in reply to his was in Martin Kolb's handwriting, that he learns that Martin Kolb died sometime in spring of 1857, (these interrogatories were taken in October, 1857,) that his recollection of Martin Kolb's handwriting is so indistinct that he cannot say whether the letter attached to these interrogatories was written by him; that if he wrote Stevens that said

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was a forgery, he had forgotten doing so, that he  
 llect ever to have seen Stevens, that he had no  
 with William Bomer, and did not know that he  
 n him.

evidence closed.

Court refused to charge, and what he did charge,  
 ear, except the refusal and the charge set out in  
 or new trial are certified to be true.

found for the plaintiff the premises in dispute,  
 idred dollars for mesne profits.

al was moved for on the grounds—

the Court erred in allowing any proof as to the  
 ts or value of rents of the premises after suit

use the Court erred in admitting the testimony of  
 ry, William G. Kolb, Peter Kolb, Alzada Kolb,  
 lton, Moses Wells and Ezekiel Higdon, for the  
 attacking the genuineness of the deeds from  
 y to William G. Kolb, and from William Kolb  
 . Ford, under which defendant claimed title, no  
 ing been made or filed by the makers, or either  
 s or the opposite party or any one else that said  
 her of them were forgeries, to the best of their  
 r belief.

use the Court erred in refusing to charge as re-  
 ounsel for defendant, that the testimony of wit-  
 n by interrogatories, executed in a distant State,)

were unknown to the jury, impeaching the gen-  
 a deed by simply testifying to the fact that the  
 t a different place from that at which the deed  
 it the time it was made, was of a weaker and  
 ble character as evidence to impeach the deed,  
 proof that the deed was not the deed of the  
 s not in the handwriting of the maker, and that  
 possible and in the power of the party relying  
 achment of a deed to (make) this proof, it was  
 do so, and the failure to produce this, it being  
 the power of the party to do so, his relying

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rather on the proof of the maker's being at a different place at the date of the deed, was a circumstance against the party offering the testimony.

4th. That the Court erred in charging instead, that, proof of an *alibi* at the date of the deed, was but another mode of impeaching the deed, and if it satisfied the jury that the deed was a forgery, this testimony was competent for that purpose. And lastly, because the verdict was contrary to the evidence, and the weight of evidence, and contrary to law.

The Court refused the new trial upon condition that plaintiff's attorney would write off the recovery of mesne profits, which was then and there done.

Error was assigned in the Supreme Court upon the grounds taken in said motion.

*Note.*—By consent of counsel the original deeds came up with the record, and were used in the Supreme Court by counsel and the Court for inspection.

Judge R. F. LYON, for plaintiff in error.

L. P. D. WARREN and Gen. J. G. WRIGHT, for defendant in error.

WALKER, J.

1. In an action of ejectment, a registered deed for the premises in dispute, shall be admissible in evidence in any Court in this State without further proof. Code, Sec. 2674. To this rule there is one exception, namely: when the maker of the deed, or one of his heirs, or the opposite party in the cause, will file an affidavit that said deed is a forgery, to the best of his knowledge and belief. In such case, the Court shall arrest the cause and require an issue to be made and tried as to the genuineness of the alleged deed. *Ib.*

2. This is a cumulative remedy. A party alleging a deed to be a forgery is not obliged to make the affidavit. After the deed has been admitted, he may introduce any competent evidence to impeach it. If he can successfully attack the deed without making the affidavit, it is his right to do so.

3. If the affidavit be filed, it then becomes the duty of

suspend the case, until the issue as to the genuineness of the alleged deed is tried. In this case the party offered the affidavit prescribed, but introduced evidence to satisfy the jury that the deed in controversy was not genuine. There was no error in the Court in permitting

the party to insist that the Court erred in refusing to charge the jury that the testimony of witnesses impeaching the genuineness of the deed, by showing that the alleged maker, at the time the deed was made, was of a more unreliable character than the maker, or that the deed was not the deed of the maker, or that his handwriting was not his, and the failure to do so, when he had the power to make this proof, was a circumstance in favor of the party offering the testimony. A party has the right to present such competent testimony as he may see proper, and the jury, by any legal testimony, establish the truth of the facts. If the jury should not be told that the introduction of such testimony, rather than some other testimony, is a circumstance in favor of the party, is a circumstance against the party. Parties have the right to introduce such competent testimony to establish the truth of their cases. If the testimony is competent, pertinent to the issue to be tried, and tends to clear the point in controversy, this is sufficient, and the jury ought not to be told that it is of an unreliable character.

There are different circumstances which may impeach the facts proved in this case satisfied the minds of the jury that the deed in controversy was not genuine. Other circumstances, if they exist, have been proved. All that is required of the party to present competent testimony sufficient to satisfy the minds of the jury, and his task is done. It is the duty of the Court to see that the testimony introduced is competent, and the jury will decide upon the credibility, and the effect of it. There was testimony in this case sufficient to sustain the verdict.

The judgment is affirmed.



# CASES

ARGUED AND DETERMINED

IN THE

Supreme Court of the State of Georgia,

AT MILLEDGEVILLE,

DECEMBER TERM, 1867.

Present—HIRAM WARNER, *Chief Justice*.  
          IVERSON L. HARRIS, } *Judges*.  
          DAWSON A. WALKER, }

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GIBBONS, *alias* JIM BENTLY, &c., negro, plaintiff in  
error. THE STATE OF GEORGIA, defendant in error.

On the decision of this Court in the case of William Gibson, a  
negro of color, *vs.* The State, decided at the December Term,  
of the Superior Courts of this State, prior to the Act of 17th March,  
1865, not have jurisdiction for the trial of a free person of color,  
for the offence of "larceny after a trust delegated," com-  
mitted on the 4th December, 1865.

After trust delegated. Motion in arrest. Decided  
for the plaintiff. LEMMING. Chatham Superior Court. January  
1867.

On indictment charged "James Gibbons, *alias* Jim  
Gibbons, with the offence of larceny after a trust had  
been delegated." The subject matter of the larceny was a  
wagon of one Oliver, alleged to have been intrusted  
to him, and by him converted, &c., on the 4th of De-  
cember, 1865.

The defendant plead not guilty, was tried and convicted. His counsel moved to arrest the judgment of the following grounds:

1st. That on the said 4th day of December, 1865, the defendant was not, by the laws of this State, "a person of color," as charged in the indictment, but a "free person of color," and as such should have been indicted and tried.

2d. The Superior Court had no jurisdiction of this offence; and

3d. That no such offence as that charged in the indictment existed at said date, under the Penal Code of Georgia.

The Court overruled the motion, and sentenced the defendant to be imprisoned in the penitentiary, (or such other place or places as the Governor shall direct,) for four years, &c.

This refusal to arrest the judgment for the reasons stated, is assigned for error.

T. S. HESSELTINE, for plaintiff in error.

A. B. SMITH, Solicitor General, for the State.

WARNER, C. J.

The error assigned to the judgment of Court below in this case, is in holding that the Court had jurisdiction for the trial of the offence charged in the indictment. The question made in this record is not now an open one in this Court. In the case of William Gibson, a person of color, vs. the State of Georgia, decided at the December Term, 1866, (not yet reported,) it was held that the Superior Courts in this State had no jurisdiction of the offence of "Larceny from the House," alleged to have been committed by a free person of color, on the 3d day of February, 1866, prior to the passage of the Act of 17th March, 1866. In this case, the offence is alleged to have been committed on the 4th day of December, 1865. This case being clearly within the decision made in that case, upon the question of jurisdiction, we are controlled by it.

Therefore let the judgment of the Court below be reversed.

HASS, plaintiff in error, vs. SARAH E. GARDNER, defendant in error.

ing to eject an intruder from the possession of land, under section of the Revised Code, if the defendant fails *at once* to the sheriff such an affidavit as is required thereby, he will be he will not be allowed to tender a *defective* affidavit, retain under that, and when it is decided against him, tender davit in terms of the law, to protect his possession.

ing to remove intruder on land. Decided by RK. Terrell Superior Court. May Term, 1867.

Gardner, for herself and others, made and delivered sheriff the affidavit required by law to remove certain lands. Hass filed a counter affidavit. At 1866, upon motion, the Court held his affidavit in law, upon the ground that the word *legal* did in it, and ordered the sheriff to eject Hass and E. Gardner possession of the land. Before this executed, but while the sheriff was about to execute, he tendered the sheriff another counter affidavit. The sheriff returned the papers to May Term, 1867, and upon motion made, the Court held that the sheriff ought to receive said second affidavit, and ordered him to do so in said order.

order is assigned for error.

NOTTEN, for plaintiff in error.

, representing HARPER, for defendant in error.

t, C. J.

a proceeding under the 4,000th section of the Code, to eject an intruder from the possession of land, the defendant filed a counter affidavit, and the papers were returned by the sheriff to the next Superior Court. At the May Term of the Court, 1866, the plaintiff moved to set aside the defendant's affidavit, upon the ground that the word *gal* was not in it, the defendant swearing, "that



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Hass vs. Gardner.

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he does in good faith claim a *right* to the possession of said land," instead of swearing that he does in good faith claim a *legal* right to the possession of said land, as the law required him to do. The Court dismissed the defendant's affidavit, and ordered the sheriff to eject the defendant from the premises and put the plaintiff in possession thereof. When the sheriff went to execute this order of the Court, the defendant tendered to the sheriff another affidavit in legal form, which was received and returned to the May Term of the Court, 1867. The Court decided that the sheriff had no right to take the second affidavit, and ordered him to put the defendant in possession of the premises, as directed by the first order,—to which decision the defendant excepted, and assigns error therefor. The proceeding to eject intruders was intended to be a speedy and summary process—the defendant is to be turned out of possession, unless he "shall *at once* tender to the sheriff a counter affidavit, stating that he does in good faith claim a *legal* right to the possession of said land." To allow the party in possession of land as a *mere intruder*, to retain possession by making defective affidavits, would be to defeat the sole object of the statute. The record in this case shows that the defendant retained his possession twelve months at least. Under this section of the Code, when the defendant, in a proceeding against him as an *intruder*, desires to retain his possession, he must *at once* make such an affidavit as the law requires, or he will be *turned out*,—he will not be allowed to retain possession of the premises under a defective affidavit, and then to file another and *still retain possession*. There was no error in the judgment of the Court below in this case.

Let the judgment of the Court below be affirmed.

W. WHEAT, plaintiff in error, vs. CHARLES W. ARNOLD, defendant in error.

issory note is offered in evidence, and it appears to have d in a material part thereof, it is incumbent on the plaintiff such alteration. If a material alteration is made in a prom- by a party claiming a benefit under it, with intent to defraud or other parties to it, such alteration voids the whole con- so insist; but if the alteration was unintentional or by not made with intent to defraud, it will be enforced by the such cases, the evidence should be clear and satisfactory int that the alteration of the note was made under such cir- as will rebut all motive of any *fraudulent intention*; other- ty making such material alteration, should suffer the legal s resulting therefrom.

t. Motion new trial. Decided by Judge UNDER- apbell Superior Court. February Term, 1867.

ed Wheat on the following promissory note:

ATLANTA, GEORGIA, March 8th, 1858.

onths after date, I promise to pay to Thomas der, at the Bank of Fulton, the sum of Eleven l Forty-seven Dollars and Seventy-nine Cents, ived.

A. W. WHEAT."

—"THOMAS BULLARD,"

"RICHARD MOORE,"

"J. C. DANFORTH."

as that "said note has been altered and changed d and delivered the same, without his know- nt, in this, that the figure and letter '8th' fol- ord 'March' in said note, have been inserted ring and delivery of the same, and the words llars and twenty-nine cents' in the body of said n erased, and the words 'forty-seven dollars and ents' interlined and written, instead of the first d, and without the knowledge or consent of de- is plea is verified by Wheat's affidavit. note was tendered in evidence, it was objected to

on the ground that it "had been altered, erased and interlined, and antedated and increased to a larger amount after it had been signed and delivered by defendant and accepted by J. D. Lockhart, the then owner," &c. The objection was overruled, and the note (and notarial protest) were read in evidence.

Plaintiff then examined WILLIAM ADERHOLD, who testified, that he was, at the date of the note, defendant's chief clerk; he saw the note signed, sealed up in an envelope and mailed to J. D. Lockhart, Atlanta, Georgia; that the words "forty-five dollars and twenty-nine cents" in the body of the note were not erased, and the words "forty-seven dollars and seventy-nine cents" interlined in lieu of them, and the figure "8" following "March" was not inserted in said note, but was a blank when the note was mailed.

A copy of original bill of goods was exhibited to witness, which was dated 22d of March, 1858, (in whose favor, against whom or for what amount the bill was, does not appear by the record); and witness stated that that was the date of the purchase of the goods; he saw them packed and was present at their reception, and said bill was not otherwise settled for than by the giving of said note, and the words "forty-five dollars and twenty-nine cents" were erased, and the words "forty-seven dollars and seventy-nine cents" were interlined after said note was given—which can be seen by reference to the note.

The evidence having closed, the Court charged the jury, that "if a written contract be altered intentionally and in a material part thereof, by a person claiming a benefit under it, with intent to defraud the other party, such alteration voids the whole contract, at the option of the other party. If the alteration be unintentional, or by mistake, or in an immaterial matter, or not with an intent to defraud, if the contract as originally executed, can be discovered and is still capable of execution, it will be enforced by the Court. If the alteration be made by a stranger, and not at the instance or by collusion of a party or privy, if the original words can be restored, the contract will be enforced.

teration in this case being as to the date and the the note, is material, and that is a question for the s a question of law, and I charge you and decide erial. The fact of the alteration and the intention it was made, are facts for the jury to find. In did this contract, the jury should believe that the was made with intent to defraud the other party, ty claiming a benefit under it, as a privy of such

believe, from all the evidence in the case, that the was made without any fraudulent intent, and that t as originally executed can be discovered and is execution, it should be enforced; or if the altera- made by a stranger, and not at the instance or by the party or a privy, if the original words and ill be restored, the contract should be enforced. not be presumed but must be proved, but may be circumstances. You will consider and weigh all e and all the circumstances of the case, and as you e, so find your verdict."

dict was for plaintiff, for \$1,145.29 and costs.

it's attorneys moved for a new trial on the follow- s:

use the Court erred in deciding that it was not on plaintiff to account for the alterations and inter- and antedating of said note before submitting it to re plea alleging under oath these facts.

use the Court erred in charging "unless they be- alterations of said note were made fraudulently, and the right to recover on the same, without prov- r by whom, or when said alterations were made."

use the Court erred in charging the jury, that if ascertain what the contract was before the altera- were made, they had the right to find a verdict for of said note before altered, notwithstanding it was t the alterations were made after the execution and said note, and without the knowledge or consent ndant.

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Wheat vs. Arnold.

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4th. Because the Court omitted to charge the jury, as was insisted on by defendant, that the *onus* was on the plaintiff to account for the alterations, and that the presumption was that the alterations were made by the holder of the note, and would be presumed to be fraudulent in the absence of testimony to the contrary.

5th. Because the jury found contrary to law and the evidence.

The Court overruled the motion and refused a new trial. For this the case is brought up for review.

WILLIAM EZZARD, J. M. EDGE, for plaintiff in error.

J. W. POWELL, for defendant in error.

WARNER, C. J.

The error assigned to the judgment of the Court below in this case, is in refusing to grant the motion for a new trial upon the several grounds specified therein. This was a suit instituted upon a promissory note, alleged to have been altered in a material part thereof, after its execution and delivery. The defendant filed his plea as to the fact of the alteration of the note under oath. When the note was offered in evidence, the defendant objected to its being read until the alteration had been explained or accounted for by the plaintiff. The Court overruled the objection, and allowed the note to be read in evidence to the jury. We think it was incumbent on the plaintiff to have explained the alteration on the face of the note, when offered in evidence, if required to do so. It is true, the 2803d section of the Revised Code relates to instruments not set forth as the basis of the action, so as to require a denial on oath, but we apprehend that section of the Code was not intended to repeal the common-law rule of evidence in such cases by mere *implication*. If, on the production of the instrument, it appears to have been *altered*, it is *incumbent on the party offering it* in evidence, to *explain* this appearance.—1st Greenleaf's Ev., 629, section 564. The plaintiff upon the trial attempted to show that this note

was given for a bill of goods purchased in Atlanta. The note is dated 8th March, 1858. The bill of goods is dated 22d March, 1858. By *whom* the bill of goods was sold, *when*, or *on whose account*, the record does not show, nor is the *amount* of the bill of goods shown. Whether the bill of goods corresponds with the *altered* amount of the note, does not appear. The evidence, as disclosed by the record before us, is entirely vague and unsatisfactory as to the *intent* of the party making the alteration in the note. That the note has been altered, and in a *material* part, there is no doubt, but by *whom*, and with what *intent*, is the question to be determined by the Court and jury under the evidence in the case.

If the alteration of the note was *intentional*, made by a party claiming a benefit under it, with intent to *defraud* the maker or other parties to it, such alteration voids the whole contract, if they so insist. If the alteration was *unintentional*, or by mistake, or *not made with intent to defraud*, it will be enforced by the Court. Revised Code, section 2801. To allow a *material* alteration to be made in commercial paper by the holder thereof, would be productive of great mischief, and whenever it is done, the evidence should be clear and satisfactory that it was done under such circumstances as will rebut all motive of any *fraudulent intention*; otherwise, the party making such material alteration, should suffer the legal consequences resulting therefrom. The evidence in this record is not sufficient or satisfactory upon *that point*, under the law which governs it, in our judgment, and we therefore reverse the judgment of the Court below, and order a new trial in the case.

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Scott vs. Scott, adm'r, &c.

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DANIEL SCOTT, plaintiff in error, vs. AMANDA SCOTT, administratrix of SAMUEL SCOTT, deceased, and THOMAS F. JONES, defendants in error.

When the assets of a mercantile firm were placed in the hands of its confidential clerk for the purpose of collecting the same and paying therefrom the firm debts, and on a bill filed by such clerk, alleging that he had paid out of his individual funds a portion of the partnership debts: *Held*, that notes given by the firm in his possession, and receipts for money to the firm creditors, were *competent* evidence to be submitted to the jury, though not conclusive as to the fact, that the payment was made with his own money.

Equity. Motion for new trial. Decided by Judge SPEER. Newton Superior Court. March Term, 1867.

The bill of Daniel Scott, against Amanda Scott, as administratrix of Samuel Scott, of Newton county, and Thomas F. Jones, of Calhoun county, contained the following averments: David M. Parker, Samuel Scott and Thomas F. Jones were merchandizing at Clarkesville, Newton county, Georgia, under the firm name of Parker, Scott & Co., till 1849, when Parker withdrew, and the other partners continued the business at the same place, under the firm name of Scott & Jones, till near the end of 1852.

Daniel Scott was Samuel Scott's brother and Jones' brother-in-law, and was during the most of the time said last firm did business its confidential clerk and agent, having almost exclusive control of the business, as both of the partners were otherwise engaged.

When they dissolved, they delivered to Daniel the books of accounts and some notes, with instructions to collect and with proceeds pay the debts of the firm. He took upon himself this trust, and finding that the debts were greater than the assets, in carrying out the trust, from time to time advanced his own funds to pay the firm debts. He owed the firm when it dissolved for goods bought, and for cash, and for certain articles and notes appropriated by him, and for money collected by him on said assets; and they owed him for certain cotton which he bought from Jeremiah Scott, for

money advanced towards paying their debts and their promissory notes.

A balance sheet of said account between him and the firm is exhibited in his bill, by which it appears that it owed him \$1,842.65, besides said notes. On the 2d of June, 1854, he presented the balance sheet to Samuel Scott, and delivered up to him the firm books and vouchers; he examined it and said it was correct, except that Daniel owed the firm four dollars for steelyards, which had not been charged against him in said balance sheet, and this was at once corrected. Daniel asked Samuel to pay him, but he put him off, saying he (Samuel) and Jones must first settle; then he asked Jones to pay him, and he also excused himself because he and Samuel had not settled the firm business. Samuel wished Daniel to sue the firm, so as to force Jones to settle with Samuel, but Daniel did not like to sue his relations. Samuel meanwhile advanced Daniel various sums of money, but instead of taking Daniel's receipts for the same as so much in extinguishment of the firm account, took Daniel's notes, with the understanding that he would hold them till Samuel and Jones had a settlement, and then give them up to Daniel. According to this arrangement, Daniel got from Samuel the following sums, and gave his notes, payable to Samuel Scott or bearer, all due one day after date, to-wit: For \$706.65 on the 15th of June, 1857; \$45.72 on the 18th of February, 1858; \$558.90 on the 12th of July, 1858; and \$100.00 on the 28th of September, 1858; and also another for \$249.54 on the 29th of February, 1856, payable to James Scott or bearer.

In 1859 Samuel died, leaving Daniel unpaid and the firm business unsettled. His wife Amanda became his administratrix, and as such sued Daniel on his said notes to November term, 1861, of Newton Superior Court. (He plead his account against the firm as set-off, and that he was not indebted by reason of said understanding, confessed judgment, and entered an appeal).

Pending this appeal (in 1866), he filed this bill stating the foregoing and that the administratrix pretends that the firm



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Scott vs. Scott, adm'x, &c.

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owes him nothing, that Samuel's estate is of doubtful solvency, and praying that she and Jones be compelled to account with each other and settle the firm business, and then account and settle with him, and that meanwhile her said common-law action be enjoined.

The injunction was granted and the administratrix was served.

In her answer to the bill, she states that she understood that the firm sold out to Daniel, but knew nothing about the charges in the bill, insisted on proof, and plead the statute of limitations.

In March, 1867, Jones came forward and answered the bill, admitting the charges therein, and stating that in 1859 Samuel told him that the firm owed Daniel, that he had advanced \$1,600.00 or \$1,800.00 to Daniel, and had taken his notes as evidence of the amounts, and would give them up to Daniel when he (Samuel) and Jones could settle. Jones had also advanced money for the firm; they agreed to see Daniel and have a full settlement, but before they did so Samuel died.

On the trial complainant read in evidence said common-law action and the pleadings aforesaid, and the interrogatories of E. H. Lundley and James Scott.

LUNDLEY testified that Samuel Scott said to him in December, 1857, and February, 1859, that he had advanced \$6,000 for Scott & Jones, and Jones owed him half of it, that the firm owed Daniel Scott about \$3,000.00 for cash advanced for it, that he had from time to time since the dissolution let Daniel have money, in all about \$2,500.00; he said nothing about said understanding as to the notes, but said the notes were for borrowed money.

JAMES SCOTT testified that his brother Samuel, at their mother's sale, in December, 1867, said Scott & Jones owed Daniel, and he wished to settle the firm business and pay Daniel; and in March, 1858, he said to James that he had let Daniel have money and took his note, and told him to sue Jones, but that Daniel would not sue, and he would force him to pay the note if he did not sue. James said to him

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that he was too hard on Daniel, that perhaps Daniel's papers were not in shape for suit, but Samuel said Daniel's claims were just, and if he would sue the firm the firm would settle.

JOHN SCOTT, another brother, swore that in 1858, at Conyers, Daniel showed him his account against Scott & Jones; John told Samuel of it, and he replied that the firm did not owe Daniel that much, because he had let Daniel have fifteen hundred or two thousand dollars.

Complainant also read in evidence the books of the firm so far as applicable to the matters in hand, and various notes, etc., which he had paid off, cotton receipts, etc.

He then offered in evidence the following papers, after proving the signatures :

" AUGUSTA, January 21st, 1851.

" \$1924.68.

" One day after date we promise to pay to the order of Gould, Bulkley & Co., nineteen hundred and twenty-four 68-100 dollars for value received.

SCOTT & JONES."

Endorsed thus :

" Received, January 26, 1852, one hundred and sixty-eight 08-100 dollars, net proceeds eight bales cotton. J. T. MITCHELL."

" Received, February 27th, 1852, nine hundred and sixty 74-100 dollars, per Mr. Scott."

" Received, October 7th, 1852, of Doughty & Beall, five hundred and thirty-three 48-100 dollars, as per receipt given them.

" Balance note \$256.38, and interest \$197.72—\$454.10 paid February 14th, 1853. GOULD, BULKLEY & Co."

" AUGUSTA, GA., September 21, 1851.

\$488.48-100.

" Four months after date we promise to pay to the order of Gould, Bulkley & Co., four hundred and eighty-eight 48-100 dollars, at ———. Value received. SCOTT & JONES, by D. SCOTT."

Endorsed thus :

" Note.....\$488 48  
Interest..... 86 47  
\$524 95

" Amount credited on their note of  
April 9, 1851, at four months,  
twenty 95-100 dollars.  
GOULD, BULKLEY & Co.

" Paid Feb. 14, 1853.

Memorandum :

This note as above...\$ 524 95  
Note of Jan. 21, 1851 454 10  
Note of April 9, 1851 20 95

\$1,000 00."

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Scott vs. Scott, adm'r, &c.

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"\$988.20.

" AUGUSTA, April 9th, 1851.

"Four months after date, we promise to pay to the order of Gould, Bulkley & Co., nine hundred and eighty-six 20-100 dollars, for value received.

SCOTT & JONES, per D. S."

Endorsed thus:

"Received, February 14, 1853, per D. Scott, twenty 95-100 dollars. Received, February 14, 1853, per D. Scott, five hundred dollars, note given. Balance note, \$465.25; interest \$151.98, (total \$617.23). Paid April 12, 1854, by Daniel Scott—paid with S. Scott's money."

" AUGUSTA, February 14, 1852.

"Received of Mr. D. Scott five hundred dollars, which amount is credited on Scott & Jones' note of April 9, 1851.

GOULD, BULKLEY & Co., by A. C. BEAN."

" AUGUSTA, June 13, 1853.

"MR. DANIEL SCOTT:

*Dear Sir*:—Yours of yesterday is to hand, and we have enclosed bill of bale of Osnaburgs sent to-day to Conyers. We also enclose account of sale of one bale Cotton sold May 19th. The S.S. 7 bales Cotton of S. Scott referred to, we find by our books were sold October 6, 1852, at 10½c. Cotton is in fair demand at low prices. DOUGHTY & BRALL."

" AUGUSTA, 22d June, 1854.

"D. SCOTT, Esq:

*Dear Sir*:—We are in due receipt of yours of the 20th inst., with the enclosure of \$35.00, which is placed to your credit. Below find statement of 7 bales Cotton sold October 6, 1852.

"Yours,

DOUGHTY & BRALL.

S.S. 7 bales Cotton, weighing 2,814 lbs., at 10½c., \$284.91, less charges \$12.66. Net proceeds \$272.85."

" AUGUSTA, GA., October 20, 1851.

"\$157.82.

"Six months after date we promise to pay to the order of Force, Conley & Co., one hundred and fifty-seven 82-100 dollars at their office. Value received.

SCOTT & JONES, by DANIEL SCOTT."

" AUGUSTA, GA., May 11, 1852.

"\$106.28.

"Six months after date we promise to pay to the order of Force, Conley & Co., one hundred and six 28-100 dollars at their office. Value received.

SCOTT & JONES, by DANIEL SCOTT."

" AUGUSTA, GA., June 4, 1852.

"\$225.43.

"Ninety days after date we promise to pay to the order of Force, Conley & Co., two hundred and twenty-five dollars, at either of the banks in Augusta, Ga. Value received.

SCOTT & JONES."

Endorsed: "FORCE, CONLEY & Co."

Scott vs. Scott, adm'r, &c.

"CHARLESTON, S. C., June 4, 1852.

4.  
 Sixty days after date we promise to pay to the order of B. W. & J.  
 & Co., at the Mechanics' Bank, at Augusta, two hundred and  
 14-100 dollars, for value received. SCOTT & JONES."

Ised thus:

1. & J. P. Force & Co., per attorney F. A. Mitchell. Pay Me-  
 Bank, of Augusta, Ga. Augusta, August 26, 1852—Received  
 thin note two hundred and five dollars:

SCOTT & JONES TO FORCE, CONLEY & Co., Dr.

May 12—To merchandize, \$295.00. Received payment,  
 FORCE, CONLEY & Co."

"AUGUSTA, GA., June 2d, 1851.

months after date we promise to pay to the order of G. W. Ferry  
 twenty-two 10-100 dollars, at ———. Value received.

SCOTT & JONES, by DANIEL SCOTT."

ed, Augusta, Ga., May 11th, 1852, fifty dollars on the within  
 G. W. F. & Co."

"AUGUSTA, GA., May 11th, 1852.

30.

months after date we promise to pay to the order of G. W. Ferry  
 twenty-three 18-100 dollars, at their store in Augusta. Value

SCOTT & JONES, by D. SCOTT."

PARKER, SCOTT & Co.,

To ADAMS, HOPKINS & Co.

27—To charge on Packages.....\$29 75  
 12—Interest to May 12..... 7 22  
 14—Interest to February 14..... 1 54

\$38 51

Received payment,

L. HOPKINS, per W."

SCOTT & JONES,

In account with Messrs. ADAMS, HOPKINS & Co.

12—Cash advanced you \$1,000.00; Oct. 14th,  
 cash advanced you, \$500.00.....\$1,500 00  
 12—Cash advanced you, \$500.00; Dec. 2, cash  
 advanced you, \$800.00..... 1,800 00  
 2—Amount of draft, thirty days..... 1,349 76  
 23—Cash handed Mr. Scott, \$1,000.00; 30th, acc't  
 aft, thirty days, \$1,000.00..... 2,000 00  
 27—Cash advanced..... 550 00  
 6—One bale cotton 505—406 at 7½..... 80 45  
 23—Cash advanced \$800.00; May 12, interest to  
 te, \$47.90..... 847 90

\$7,078 11

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Scott vs. Scott, adm'x, &c.

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## PER CONTRA.

1851.	Nov. 9—By sales 28 bales cotton, \$825.27 ; December 1, do. 46 bales cotton, \$1,466.57.....	2,291 84
1851.	Dec. 5—By sales 16 bales cotton, \$482.52 ; December 12th, do. 28 bales cotton, \$902.06.....	1,384 58
1851.	Dec. 12—By sales 9 bales cotton, \$306.05 ; December 30th, do. 18 bales cotton, \$510.06.....	816 11
1852.	Jan. 22—By sales 30 bales cotton, \$1,526.23 ; February 28th, do. 22 bales cotton, \$715.48.....	2,241 71
1852.	March 3—By sale 1 bale cotton, \$28.42 ; March 5th, do. 2 bales cotton, \$66.88.....	94 80
1852.	March 24—By sales 5 bales cotton, \$128.08.....	128 08
1852.	May 12—Balance.....	120 99
		<hr/> \$7,078 11

Balance brought down \$120.99 ; interest from 12th May, 1852, to 14th February, 1854, \$6.34=\$127.33.

Received payment,

L. HOPKINS, by T. J. FOGARTY."

" AUGUSTA, GA., July 9th, 1852.

" \$32.17.

" One day after date we promise to pay to the order of Hopkins, Kolb & Co., thirty-two 17-100 dollars, at ———. Value received.

SCOTT & JONES, by DANIEL SCOTT."

" AUGUSTA, October 24th, 1850.

" \$95.00.

" Six months after date we promise to pay to the order of J. M. Newby & Co., ninety-five dollars, for value received. SCOTT & JONES.

" Received on the within note fifty-seven 52-100 dollars June 2, 1851.

" Settled in full February 14th, 1853."

" AUGUSTA, GA., May 12th, 1852.

" \$23.80.

" Six months after date we promise to pay to the order of Haviland, Risley & Co., at their office, twenty-three 80-100 dollars. Value received. SCOTT & JONES, by DANIEL SCOTT."

" Messrs. SCOTT & JONES, Conyers,

TO HAVILAND, RISLEY & Co.

1852. February 27—To Mdze, \$2.55. Paid January 14, 1853.

HAVILAND, RISLEY & Co."

" AUGUSTA, 14th February, 1853.

" Received of Messrs. Scott & Jones nine dollars and seventy-seven cents, being the amount of their account. F. HOLMAN & Co."

" MOFFATT'S OFFICE, 336 Broadway, N. Y., }  
August 31st, 1852. }

" \$30.00.

" Received of Messrs. Parker, Scott & Co., per Daniel Scott, thirty-three dollars, in full, for invoice forwarded September 16, 1848.

For WM. B. MOFFATT, Proprietor.

J. SMITH."

Scott vs. Scott, adm'x, &c.

" AUGUSTA, February 14, 1853.

Received from Messrs. Scott & Jones six 67-100 dollars, for account  
CARMICHAEL & BEAN."

" AUGUSTA, January 9, 1854.

1. SCOTT & JONES in account with DUNHAM & BLAKELY.

January 10—Bill of goods, \$7.55; May 11th, do. \$28.43; in-  
ter six months, \$2.95—\$38.93. Due M. M. Bentley, on settle-  
cents. February 12, 1853.

SCOTT & JONES,  
Per W. R. GORDON."

DECEMBER 30TH, 1849. Due B. Lumpkins, as a balance on cotton, four  
SCOTT & JONES, per J. R. RHODES.  
April 26, 1855, by DANIEL SCOTT."

Received of Elisha Wade one hundred and eight pounds of net to-  
be sold at thirty-seven cents per pound; and if not sold, to be  
when called for. February 10th, 1852.

SCOTT & JONES, by DANIEL SCOTT."

These papers were rejected by the Court.

SCOTT further testified that Daniel sold a negro to  
her in 1853 or 1854, and got six or eight bales of  
from her.

AS F. JONES, defendant, swore substantially as he  
swore, that he got the books of account from Samuel  
Scott after his death; Daniel's services as clerk were  
three hundred dollars per year, and he was their clerk  
as long as they did business.

Defendant closed.

Plaintiff read in evidence the notes sued on, three letters  
from Daniel Scott to Samuel Scott, and a letter from Dough-  
erty to S. Scott, a letter from Gould, Bulkley & Co. to  
Jones, and a note thereon from Daniel to Samuel  
Scott, and also a bill in equity filed by Daniel Scott  
against the same parties and touching the same matters, which

was dismissed, in order to show contradictions in the  
statements by Daniel Scott. As to the materiality of these  
papers their contents it is not necessary to say more.

The Court's verdict was for the defendant. A new trial was  
granted on the grounds that the Court erred in rejecting  
the papers, in admitting an account of Daniel Scott due  
to him of Samuel Scott, and the three letters from Daniel

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to Samuel aforesaid, and the letter of Gould, Bulkley & Co. to Scott & Jones, with Daniel Scott's note thereon, and because the verdict was contrary to law, etc.

By consent, the case was held up for a time, and afterwards at Chambers the Chancellor refused a new trial, and for this error is assigned.

JOHN J. FLOYD, for plaintiff in error.

W. W. CLARK and C. PEEPLES, for defendant in error.

WARNER, C. J.

The error assigned to the judgment of the Court below in this case, is, in refusing the motion for a new trial upon the grounds specified therein. The complainant alleges that he was the confidential clerk of Scott & Jones, having the management of their mercantile business, and being authorized by them to wind up and settle the same, to collect the assets due *to the firm*, and to pay out of such assets the debts due *by the firm*—that as such confidential clerk, he paid out of his individual funds for the debts due by the firm of Scott & Jones, the sum of eighteen hundred and forty-two dollars and fifty-five cents, over and above the firm assets which were in his hands. Samuel Scott, one of the partners, was the brother of the complainant, and Jones, the other partner, was his brother-in-law. Samuel Scott, one of the partners, is now dead; but the complainant alleges, that before his death, he exhibited to him a true account of his receipts and disbursements on account of the copartnership business, which was admitted to have been correct, and that the partners, Scott & Jones, were indebted to him the sum of money before stated. Samuel Scott, in his lifetime, as the complainant alleges, reimbursed him for the money advanced for the firm by payments made at different times, but instead of giving receipts therefor he gave his notes, at the request of his brother, to enable him to have a settlement with Jones, the other partner; the notes thus given by the complainant were made payable to Samuel Scott, and since his death, suit has

stituted thereon by his administratrix against the  
inant, who filed his bill to enjoin the collection thereof,  
g in substance the foregoing facts. On the trial of the  
he main question involved, was, whether the firm of  
Jones was in fact indebted to the complainant as  
for the payment of their debts out of his individual

To make out his case, the complainant offered in  
certain notes made by Scott & Jones, payable to  
Bulkley & Co., Force, Conley & Co., which were in  
ession, and receipts for money paid by complainant to  
persons for Scott & Jones, which are set forth in the

The admission of these papers in evidence was ob-  
by defendant, and the objection sustained by the  
In view of the facts of this case, we think these  
d receipts were admissible in evidence. It is true,  
that he has the papers in his possession, is not *con-*  
vidence that he paid them off with his own money,  
a circumstance in his favor, which may be strength-  
supported by other evidence in the case. We think  
*competent* evidence to be submiteed to the jury.

ugh we should not have reversed the judgment on  
und alone, had we been entirely satisfied with the  
endered in this case, but in looking through the  
e are not satisfied that justice has been done to the  
ant. As there will be another trial in the cause, we  
ear expressing any opinion upon the facts involved

e judgment of the Court below be reversed, and a  
granted.



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 Scott vs. Russell and Allen.
 

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JAMES N. SCOTT, plaintiff in error, vs. WM. J. P. RUSSELL, principal, and H. W. ALLEN, security, defendants in error.

When a bail-bond was taken by the sheriff, in a civil suit, payable to the plaintiff, conditioned that if the principal defendant shall well and truly pay and satisfy the condemnation of the Court, or render his body to prison in execution of the same, in terms of the law, in such cases made and provided; and upon failure thereof, H. W. A., his security, shall do it for him: *Held*, that such a bail-bond was good and valid under the laws of this State.

*Scire facias* on Bail-bond. Tried before Judge UNDERWOOD, Polk Superior Court. July Term, 1867.

Scott brought complaint and bail against Russell to April Term, 1858 of said Court; he obtained a verdict and judgment in 1862; sued out a *casa* against Russell on the 20th of February, 1866, (which was returned *non est inventus* on the 20th June, 1866,) and then sued out *Sci. fa.* against Allen, who had become Russell's bail.

The affidavit for bail was made by the plaintiff in person. The bail-bond was as follows:

GEORGIA, POLK COUNTY:

Know all men by these presents that we, William J. P. Russell and ....., security, are held and firmly bound unto James N. Scott in the sum of two hundred and forty-one dollars and fourteen cents, for the true payment of which we bind ourselves, our heirs, executors and administrators jointly, firmly by these presents. Sealed with our seals and dated this April 28th, 1858.

The condition of the above obligation is such, that whereas a civil process requiring bail, at the suit of James N. Scott against said William J. P. Russell, in an action of assumpsit, returnable to the Superior Court for said county, on the fourth Monday in April instant, hath been served on said Russell: "Now if the said Russell, in case he is cast in the said suit, shall well and truly pay and satisfy the condemnation of the Court, or render his body to prison in execution of the same, in terms of the law, in such case made and provided, and

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Scott vs. Russell and Allen.

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failure thereof the said H. W. Allen will do it for him,  
the above obligation to be void, else to remain in full  
and virtue.

W. J. P. RUSSELL, [L. s.]

H. W. ALLEN, Security. [L. s.]

Is approved by

J. C. YORK, Deputy Sheriff."

On *scire facias* the defendant plead that he was dis-  
satisfied because: 1st, the condition of the bond was onerous  
and obliged the bail to render *his* body to jail if Rus-  
sell did not pay the judgment or surrender himself: 2d, be-  
cause the bail affidavit was made by plaintiff's agent, who  
did not apprehend the loss of the debt, and not that his  
debt did: 3d, because no affidavit was made by plaintiff  
in *casa* was issued: 4th, because the long delay in  
returning the *casa* increased the risk of the bail: 5th, the *casa*  
was not returned to the proper Court nor kept out by the  
Court, but returned to the Clerk long before the term of the  
Court, the bail delivered Russell to the sheriff the day  
after giving the bond, and the sheriff received Russell and  
the bail; and lastly, Russell was in the Confederate  
Army during the late war, and for this reason could  
not be delivered up by his bail.

The trial attorneys for plaintiff offered in evidence said

It was objected to, because it was not payable to  
the Court or to the officer taking the bail, nor to the plain-  
tiff, as its condition was onerous, (as aforesaid,) and be-  
cause it obliged him to pay the debt or surrender Russell.

The Court rejected the bond and plaintiff submitted to a  
judgment. The ruling out of said bond is assigned for error.

For WADDELL, and BROYLES for plaintiff in error.

ALEXANDER, represented by AKIN, for defendant  
in error.

WARNER, C. J.

The error assigned to the judgment of the Court below in this case, is the rejection of the bail-bond when offered in evidence to the jury. Two objections were made to the bond: First, because it was not made payable to the proper party. Second, because the condition of the bond was *onerous* and not such as the law requires. The 3348th section of the Revised Code requires the bail-bond to be made payable to the plaintiff. This bond is *payable to the plaintiff*. By the 3363d section *all bail* taken according to the provisions of the Code, shall be deemed, held and taken as special bail, and as such be liable to the recovery of the plaintiff. The 3348th section before recited, declares that the sheriff or other arresting officer shall take a bond payable to *the plaintiff* with one or more sufficient securities, for double the sum sworn to, and return the same to the Court with the petition and process to which it is made returnable. The requirements of the Code are, that the bail-bond shall be in double the sum sworn to, and payable to the plaintiff. No particular *form* for such bond is prescribed by the Code, but *all bail* taken in accordance with the provisions of the Code shall be deemed, held, and taken as *special bail*, and as such be liable to the *recovery of the plaintiff*. The bond in this case recites that a civil process requiring bail has been served on the defendant, Russell: "Now, if the said Russell, in case he is cast in the said suit, shall well and truly pay and satisfy the condemnation of the Court, or render *his* body to prison in execution of the same, in terms of the law in such case made and provided, and upon failure thereof, the said H. W. Allen will do it for him, then the above obligation to be void. If Russell, the principal, shall pay the condemnation of the Court, that is to say, if he shall pay the amount which he shall be condemned to pay, by the judgment of the Court, or render *his* body to prison in execution of the same, that is to say, in execution of the judgment of the Court as the law requires, and upon *his* failure to do so, his security, H. W. Allen, will do it for him, then the bond to be void. What is it that Allen, the security, has

himself to do? He has simply stipulated in his bond Russell, *his principal*, shall pay the judgment of the Court or render *his* body to prison in execution of the same, in accordance with the law in such cases made and provided; or that in case of failure to do so, that he, the security, will pay the judgment or surrender the body of *his principal* to prison in execution of the judgment as *required by law*. The principal, in contemplation, is in the friendly custody of his bail, and the latter has the power and authority to surrender him to the Court or legal custody, at any time before final judgment is rendered *in facias* against him. Revised Code, section 3365. If the judgment of the Court is paid or satisfied by either the principal or the security, that is a release of the obligor from the bond. If Russell surrenders *his* body to prison in execution or satisfaction of the judgment, or if the security, in whose friendly custody he is, shall do it for him, or surrender the body of *his principal* to prison, as authorized to do under the law, in execution or satisfaction of the judgment of the Court, that is a release of the obligor from the bond, and in our judgment that is *the legal effect* of the bond given by the parties in this case.

In the case of Tucker vs. Davis & Potter, (15th Ga. Rep., 1854), decided by the defendant in error, the condition of the bond was —“Now if the said Goodman and Jerome, in case they are found against in their said suit, shall render their bodies to prison in execution of the law, in terms of the law, in such cases made and provided, and upon failure thereof the said security will do it for them, then the bond to be void, &c.” The condition to the bond in that case was, that there was no stipulation in it that the *principal should pay the debt or surrender himself in execution*. This omission for the payment of the judgment by the principal, or to surrender himself in execution or satisfaction of the bond, was held to be a fatal objection to the bond. In this case, however, it is stipulated in the bond that Russell, the principal, shall pay the debt or satisfy the condemnation of the Court, or render his body to prison in execution of the same, in terms of the law in such cases made and provided. In Lockwood vs.

Saffold, (1st Kelly, 72,) this Court held, that "condemnation money" in a bond is the amount fixed and settled by the judgment or decree of the Court in the case. In Tucker vs. Davis & Potter the Court further held, that the law did not impose it as a duty on the security on a bail-bond to surrender his principal to jail or to the sheriff; "that the security *may* discharge himself by surrendering his principal to the jail, or sheriff: he is not bound to do so." If he *may* discharge himself by surrendering his principal, as it is declared that he may do by the 3365th section of the Code, it is extremely difficult to arrive at the conclusion, that it would be *unlawful* for him to stipulate in his bond to do that which the law *expressly authorizes him to do*. It is true, the security may or may not surrender his principal, who is in his friendly custody, in discharge of his liability; if he does, it discharges him, if he does not, then he is liable upon his bond. The point in the case is, whether the security on a bail-bond, who obligates himself to do, what the law expressly authorizes him to do in discharge of his liability, thereby imposes an *onerous* condition, which makes the bond void? Can such a condition, inserted in a bail-bond, be said in truth *not to be warranted by law*? The law confers upon him the right to surrender his principal, at any time, before final judgment upon the *scire facias* for his own benefit and protection, and where the security obligates himself to do what the law expressly authorizes him to do for his own benefit and protection, to hold such an obligation to be *onerous* and *unlawful* is more than this Court is willing to do. The judgment of the Court in Tucker vs. Davis & Potter was right upon the invalidity of the bond, in view of the *omitted* stipulation in it, but we are not willing to hold that the stipulation in the bond for the security to do what the law expressly authorizes him to do, for his own benefit and protection, is *onerous* upon him, or *unlawful*, and thereby makes the bond *void*. The bail-bond in this case, in our judgment, is a legal and valid bail-bond under the provisions of the Revised Code.

Let the judgment of the Court below be reversed.

VALENTINE W. BOISCLAIR, plaintiff in error, vs. JOHN JONES, defendant in error.

In a proceeding to foreclose a mortgage on real estate under the provisions of the Code, the mortgagor cannot set up as a defence for himself against the mortgagee, that the property so mortgaged was *trust* property, and that he had no right to mortgage it. The mortgagee has the right to foreclose his mortgage as *against him*, there being no other parties interested before the Court.

Foreclosure of mortgage. Demurrer. Decided by Judge Clark, Randolph Superior Court. November Term, 1867.

John Jones was proceeding to foreclose a mortgage made by Boisclair, individually. Boisclair showed for cause why the rule should not be made absolute, that the mortgaged premises belonged to him as trustee and not individually.

Plaintiff moved to strike the plea. The defendant's attorney said they represented Boisclair as trustee, and his *cestui que trusts*, and appeared to protect the trust estate.

The Court held that as neither Boisclair *as trustee* nor his *cestui que trusts*, were parties to the record, they could not be heard to object to the foreclosure, and ordered the rule made absolute.

This was accordingly done, and defendant excepted and assigns the same as error.

FIELDER AND JONES, for plaintiff in error.

C. B. WOOTTEN, for defendant in error.

WARNER, C. J.

The mortgagor executed the mortgage upon the property as his own estate, to secure the payment of his individual debt. In a proceeding to foreclose the mortgage as against him, he cannot be permitted to allege that the property so mortgaged by him as his own individual property, was *not his property*, but was *trust* property which he had no right to mortgage. The maker of a deed cannot claim *adversely* to his deed, but is *estopped* from denying his right to sell and

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convey. Revised Code, Section 2657. When the mortgage shall be foreclosed against the mortgagor, and the property sold, or offered for sale under the judgment of foreclosure, and *other parties* have either a legal or equitable interest in it, they can assert their rights to it at the proper time, and in the proper manner, if they shall think proper to do so. *McDougald vs. Hall*, 3d Kelly's Rep., 174. Whatever right or title the mortgagor conveyed to the mortgagee, by his mortgage deed, may be foreclosed as against *him* in this proceeding, there being no other parties before the Court but the mortgagor and the mortgagee.

Let the judgment of the Court below be affirmed.



MARY A. CAVENAUGH AND THE COLUMBUS IRON WORKS COMPANY, plaintiffs in error, vs. GOTLIEF AINCHBACHER, propounder of SUSAN HARRIET NAIGLEY'S WILL, defendant in error.

A married woman in this State, who as a midwife acquires money by her separate earnings, with the consent of her husband, and afterwards with his consent, purchases real estate, and takes the title thereto in her own name, may devise the same by will, as her separate estate, with or without his assent, and after her death, the husband cannot invalidate such devise by a change of the title to the property in his own name, especially when his *express assent* was given to such devise at the time of the execution of the will.

*Caveat to Will.* Tried before Judge WORRILL, Muscogee Superior Court. May Term, 1867.

Jacob Naigley was a tailor by trade, but seldom if ever worked thereat. He was a quiet, sober man, and spent his time in waiting upon and carrying about his wife while she was practising midwifery, at which she was generally and actively engaged. She made a will and died. Ainchbacher offered it for proof in solemn form in the Court of Ordinary of Muscogee county. *Caveats* were filed by the Columbus Iron

Works Company, and Mrs. Cavanaugh. The Company were interested because they claimed part of the land devised by said will, and Mrs. Cavanaugh because she claimed another part of it. Mrs. Cavanaugh came to the succession on this wise: After Mrs. Susan H. Naigley died, Jacob Naigley married Mrs. Madden, and died, leaving no issue by her; his widow married John Cavanaugh, who took possession of said property, and then she died; then Cavanaugh married Miss Magnes, and died, leaving her in possession of the property.

The grounds of *caveat* were, that at the time the pretended will was executed by Susan Harriet Naigley, she was a *feme covert*; and if she had the consent of her husband to make the same, that consent had been revoked.

It went to the appeal by consent. The trial there brought out the foregoing and the following facts.

Jacob Naigley sued John Afflick in the Inferior Court of said county, and obtained a judgment against him for \$1500.00 principal, \$66.00 interest, and \$12.50 costs, and on the 13th of March, 1848, obtained a *fi. fa.* for the enforcement of his judgment.

Thereupon a levy was made and disposed of as follows:

“Levied this *fi. fa.* on the lot at the South-east corner of Front and Dillingham streets, containing a front of 147 feet 0 inches on Dillingham street, and a front of 35 feet, running back for quantity (?) on Front street. Levied on as the property of defendant.

A. S. RUTHERFORD, Sheriff.”

“The above levy sold on the first Tuesday in October, with the encumbrance of the lien of Samuel R. Andrews for the sum of fifty dollars.

A. S. RUTHERFORD, Sheriff.”

“Received of A. S. Rutherford, Sheriff, thirty-one dollars and twenty-five cents, the amount due after deducting all cost of two sales of this levy. October 3d, 1848.

JACOB NAIGLEY.”

And on the 3d of October, 1848, said sheriff executed a *fi. fa.*, (reciting that he had that day sold said property under



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said *fi. fa.*, &c., that Susan Harriet Naigley was the highest bidder, and it was knocked off to her for fifty dollars, and that she had paid him that sum,) conveying all of said lot with its members and appurtenances to Susan Harriet Naigley, her heirs and assigns. It was in the usual form of sheriff's deeds, and duly executed.

Afterwards Jacob Naigley made the following paper:

STATE OF GEORGIA, COUNTY OF MUSCOGEE.

Whereas, by the common law of force in said State a *feme covert* is precluded from making a testament, devising real estate, without the license of her husband first had and obtained: And whereas my wife Susan Harriet Naigley is in possession of a parcel or lot of land in the city of Columbus, situated on the South-east corner of Front and Dillingham streets in said city, which she is desirous of devising by will. Now, know all men to whom these presents may come, that I, Jacob Naigley, for myself, my heirs and assigns, do hereby, in consideration of my love and affection for the said Susan Harriet, and for divers other causes and considerations, we hereunto moving, freely, cheerfully and unconditionally grant to the said Susan Harriet, the right and authority to devise and dispose of the above described lot or parcel of land to any and such person or persons as she may see fit, hereby binding myself, my heirs and assigns, from disturbing those who may be in possession of said property under the said devise, and warranting and defending their title to the same, and waiving all my right and privilege to disturb or interfere, which I may have under the common law or statutes of force in Georgia.

In testimony whereof, I have hereunto set my hand and seal, this 20th July, 1850.

JACOB NAIGLEY, [L. S.]

Signed, sealed and acknowledged in presence of

A. ANDERSON,

S. HOFFMAN,

ALEX'R C. MORTON, Justice Inferior Court.

At the same time and place, and in presence of the same persons as witnesses, Susan Harriet Naigley executed her will in the usual form of such instruments.

It was substantially as follows :

GEORGIA, MUSCOGEE COUNTY.

I, Susan Harriet Naigley, \* \* \* \* \*  
and "having first obtained license and authority from my lawful husband, do therefore make this my last will and testament, hereby revoking all others heretofore made by me."

Item 1st, provided for christian burial, &c.

Item 2d, directed prompt payment of her debts.

Item 3d, Whereas by a deed made to me, on the third day of October, in the year one thousand eight hundred and forty-eight, by Adolphus Rutherford, sheriff of said county, I came into and now hold, by the consent of my husband, in possession of a lot or parcel of land in the city of Columbus, being the South-east corner of Front and Dillingham streets, having a front on Front street of thirty-five (35) feet, and a front on Dillingham street of one hundred and forty-seven feet ten inches, known as having once been the property of one John Affleck, I do hereby give, bequeath and devise the above described lot or parcel of land to my husband Jacob Naigley, to be used and employed by him, and not at all subject to his debts or to be sold by him, for and during his natural life, and at his death, to be held and employed by my beloved grand children hereinafter named, to be held by them in joint tenancy. The grand children herein alluded to, are Goitlief Ainchbacker, Samuel Ainchbacker, and Louis Ainchbacker. And in the event of the death of all of said children before the death of my said husband, then the above described property to be his in fee simple; and in the event of the death of either of the said children, then the property to the survivor or survivors of them; and in the event of the death of all of said children and my said husband, then the above described property to go to the heirs of said children."

The will was written by Morton when Mrs. Naigley was the wife of Jacob Naigley, and when she was of sound and

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disposing mind, and the license by her husband was executed under Morton's advice to make her will valid. She died about four months after the will was executed.

Afterwards, on the 11th day of October, 1851, Jacob Naigley executed an instrument under seal and attested by three witnesses, in the words following: "Whereas, on the 20th day of July, in the year 1850, I, Jacob Naigley, by instrument of writing, then signed and sealed by myself, I did then declare that Susan Harriet Naigley, then in life, being the wife of me, the said Jacob, might, of her own will and accord, devise certain real estate described by said instrument as being then in the possession of said Susan Harriet Naigley, viz: lot on the South-east corner of Front and Dillingham streets, in the city of Columbus: And whereas, the power and authority thereby vested, amounting alone to the making a disposition of the same by will, by and through my said wife, then in life, but now deceased: And whereas, the right to revoke any will that the said Susan Harriet Naigley may have made, devising and disposing of any real estate then and now belonging to me: Now, know all men, that I, Jacob Naigley, being of sound mind, do hereby revoke and recall all power and authority then intended to be vested by me in my aforesaid wife, the said Susan Harriet. And I do hereby revoke any and all wills, instruments, deeds, gifts or conveyances, any and all devises whatever that the said Susan Harriet Naigley may have made of the said lot of land in the city of Columbus, on the South-east corner of Front and Dillingham streets, and the same is hereby declared void and of no effect whatever, hereby retaining to myself, my heirs and assigns, all the right and title to the aforesaid lot of land, as fully as if no such instrument was ever made, or any will ever made by the said Susan Harriet Naigley to any person or persons whatever. In testimony," &c.

This revocation was recorded in the office of the Clerk of the Superior Court, on the 30th of October, 1851.

Afterwards, on the 11th of November, 1851, Jacob Naigley obtained an order of said Inferior Court that the then sheriff should make a deed to said Jacob Naigley for said lot.

It was recited in the order that Rutherford levied on said land by said *fi. fa.* and sold it, that it was knocked off to Jacob Naigley at \$50, and that Rutherford failed to make a deed therefor to Jacob Naigley, but "improperly" executed said deed therefor to said Susan Harriet Naigley. And according to said order, F. A. Jepson, sheriff, on the day last aforesaid, executed a deed to Jacob Naigley for said land, in the usual form of sheriff's deeds. It was duly recorded on the same day.

The evidence being closed, the Judge charged the jury among other things, as appears in the opinion.

The *Caveators* requested the Court to charge the jury that the receipt upon the *fi. fa.* by Jacob Naigley in evidence, is such a receipt as is proper to be given when the plaintiff in *fi. fa.* purchases at a sale under his own *fi. fa.*, and therefore such receipt does not prove that he was or was not the purchaser and paid the money, nor does such receipt tend to prove that any other person paid the money: further should they find, from the evidence, that the Columbus Iron Works Company are purchasers of the property in controversy for a valuable consideration, deriving their title from Jacob Naigley, the husband, then the equitable separate estate in Mrs. Naigley, such as might ordinarily enable her to convey by will, which will cannot be set up by the propounder (he being a mere volunteer,) so as to defeat the title of such purchasers or value.

The Judge declined to give either of said requests. The jury set up the paper as Mrs. Susan Harriet Naigley's last will.

The errors assigned by the plaintiffs in error are the charges of the Court as aforesaid, and his refusal to give in charge said requests.

W. WILLIAMS and B. HILL for plaintiffs in error.

ALEX'R MORTON and H. L. BENNING for defendant in error.

WARNER, C. J.

The main question presented for the judgment of the Court in this case is, the right of Mrs. Naigley, a married woman, to devise by will the property specified in the record, under the state of facts presented therein. A married woman may make a will in this State, when having a separate estate *absolutely*, or an estate in *expectancy* her husband consents to her disposing of the same. Revised Code, Section 2375. The husband's consent is not necessary except to dispose of an estate in *expectancy*. In *Liptrot vs. Holmes* (1st Kelly's Rep. 389) this Court recognized the principle, that a *feme covert* might dispose of her *separate property*, that the moment property can be enjoyed, it must be enjoyed *with all its incidents*. The property in controversy in that case, was *personal* property, but we think there is no sound distinction between the right of a *feme covert* to dispose of her separate personal estate and her separate real estate by will, inasmuch as both estates under our law are placed on the same footing as to distribution: the more especially in this case, as the personal earnings of the wife were received by her in money, and invested in real estate by the *consent of her husband*. The errors assigned are, to the charge of the Court as given to the jury, and the refusal of the Court to charge the jury as requested by the counsel for the caveators. The Court below charged the jury "that if the property disposed of by the will was the separate estate of Mrs. Naigley, purchased with her own earnings as a midwife, with the consent of her husband, then she had the right, although a *feme covert*, to dispose of the same by will without the assent of her husband. If, therefore, the jury should believe from the evidence that Mrs. Naigley had earnings separate from that of her husband and with his consent, and that she purchased the property in controversy and paid for it with her own money, and took the sheriff's deed therefor to herself, and all this with the *assent of her husband*, then the property became her separate estate, and she had the right to devise the same by will without her husband's consent, and in such event,

the fact that the husband procured a change of the title after her death, cannot effect the validity of her will so made." The jury found a verdict in favor of the proponent of the will—which establishes the fact that the property devised by Mrs. Naigley was her *separate property*. We find no error in the charge of the Court below to the jury upon this point in the case; the question was fairly submitted to them upon the evidence, and this Court is satisfied with their verdict. Nor is there any error in that part of the charge of the Court relating to the acts of the husband in procuring a change of title after Mrs. Naigley's death, so far as the *validity* of her will is concerned. The property devised by her was her *separate property*, or it was not, at the time of making her will, and at the time of her death. The subsequent conduct and acts of the husband *manipulating* that title, either for his own benefit or that of others, *after her death*, could not affect her right to dispose of her separate property by will, or *invalidate* her act in doing what she had the lawful right to do, with or without his assent,—the more especially *with his assent*—at the time the will was executed. The first request to charge the jury was properly refused by the Court below, for the reason that it requires a definite expression of opinion of the Court to the jury as to the effect and weight of the evidence, which the receipt upon the *fi. fa.* might have upon their minds. The Court admitted the evidence as *competent* for the consideration of the jury, and that was all the Court had any right to do with it; the effect and weight of that evidence was a matter exclusively for the consideration of the jury. The receipt upon the *fi. fa.* speaks for itself, and it was not for the Court to say whether it was a *proper receipt to be given*, or not; that was a question for the jury, and it was also a question for the jury to say what was *needed to prove*, and not a question for the Court to decide. The second request to charge the jury was also properly refused, in view of the issue then before the Court for trial. Whatever rights the Columbus Iron Works may have to the property as purchasers from Jacob Naigley, the husband, may hereafter asserted in a proper case made before the Court.

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Wise vs. Copley, Stone & Co.

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The question upon trial was, whether Mrs. Naigley had the right to dispose of the property by will as her separate estate. The title to the property devised by the will, as between the devisees and the Columbus Iron Works, was not before the Court for trial.

Let the judgment of the Court below be affirmed.

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B. A. WISE, plaintiff in error, vs. COPLEY, STONE & Co.,  
for the use of W. L. LECONTE, defendant in error.

A. J. RIDDLE, plaintiff in error, vs. THE SAME, defendant  
in error.

A creditor of an individual member of a mercantile firm, who purchases goods of such individual member, at his solicitation, knowing the goods so purchased to be copartnership property, which goods were charged to the purchaser on the copartnership books—cannot, in a suit instituted by the copartnership or their assignee for the value of the goods, plead payment, or a set-off thereto, the indebtedness of such individual partner, in bar of the plaintiff's right to recover, in such suit. The sale by one partner of the copartnership effects in payment of his individual debt, is not binding upon the other partners, without their knowledge and assent thereto *be clearly and distinctly proved*.

*Certioraris* from the Justices' Court. Decided by Judge COLE. Bibb Superior Court. November Term, 1867.

F. H. Stone owed Wise \$53.35, and afterwards formed a partnership with W. S. Copley and W. L. LeConte, as merchants, under the style of Copley, Stone & Co.

Wise presented his account against Stone to him, at the store of the firm, and Stone asked him to trade out the amount in the store. Wise agreed to do so, and received at different times, in the usual course of trade, goods worth \$35. out of said store and from the goods which Wise knew belonged to the firm.

Stone charged the goods to Wise on the firm books, but

Wise did not know this at the time; he supposed Stone would keep an account of the goods as they were delivered, but did not know whether Stone would charge them on the firm books to himself or to Wise.

The other partners were absent when this arrangement was made, and knew nothing about it; but Wise did not then know whether they knew it or not.

Afterwards the firm dissolved, being in debt to LeConte and other outside creditors. All of their assets and the book accounts were assigned to LeConte to pay first the outside creditors and then himself. LeConte paid the outside creditors, all except about \$10.

In the name of the firm for his use, he sued Wise for said goods. Wise plead payment.

Besides the foregoing facts, it also appeared that Wise did not credit his account on Stone with the goods received by him from the firm's store, nor on his books, nor by giving a receipt.

The facts in Riddle's case are as follows:

After the firm was formed, Riddle did work for Copley worth \$34, and for Stone worth \$14, and went to the firm's store to collect his bills.

Copley asked Riddle to trade out the bill in their store, saying they were young merchants needing money, &c. Stone was sitting in the window, and Riddle then thought he heard what Copley said. To accommodate them he consented to trade out both bills, and accordingly from the 11th of May to the 16th of August, 1866, he obtained from Copley, Stone & Co., groceries worth \$43.47. He had not before traded with them, and took these goods at Copley's solicitation, believing Stone was a party to the transaction.

He did not know, nor did he consider, whether the goods would be charged on the firm books to him or to Copley and Stone. He usually bought for cash, and did not make accounts. His said bills were never paid except by the receipt of said goods.

He did not know, when the arrangement was made nor when he got the goods, that LeConte disapproved of the ar-



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Wise *vs.* Copley, Stone & Co.

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rangement, nor did he know LeConte; he knew a man by that name belonged to the firm. But LeConte was a member of the firm, so advertised in the daily newspapers of Macon and by placards in the store.

The books of the firm contained an account against each of its members, but the goods gotten by Riddle were charged to him and not to Copley or Stone. Riddle never credited Copley's or Stone's accounts with the goods received, nor receipted either of them for the same; he kept no books.

LeConte was never informed of this arrangement while the partnership lasted, and never assented to it. He sued Riddle on said account, in the firm's name for his use, and Riddle plead payment, and showed the dissolution and assignment as in Wise's case.

The cases were pending in the Justices' Court, and upon the foregoing facts, judgments were rendered against each of said defendants for the amount of his account and costs.

Each sued out *certiorari*. By consent they were argued together in the Court below, and the *certioraris* were dismissed because the Judge thought the judgments right under the facts aforesaid. And now (in one bill of exceptions) this Court is asked to reverse said decision.

BACON & SIMMONS, E. F. BEST, for plaintiff in error.

LANIER & ANDERSON, for defendants in error.

WARNER, C. J.

The only question presented by the record in this case is, whether a creditor who holds a demand against an individual member of a mercantile firm, purchases the copartnership goods from that individual member of the firm, knowing the same to be copartnership property, can, in an action brought against him by the partners or their assignee for the value of the goods so purchased, plead that demand, either as payment, or as a set-off against the copartners or their assignee. The goods were purchased of one of the copartners at his solicitation, by the creditor of the individual partner, and

were charged to the purchaser on the copartnership books. It is a well settled rule, that one partner cannot dispose of the copartnership property in payment of his *individual* debt, without the *assent* of his copartners, either express or by necessary implication. In order to create the implied assent of the other partners to such a transaction, the evidence should be clear and satisfactory, which the evidence in this record does not establish. It is true, that each partner is the agent of his copartners when acting *within the scope* of the copartnership business; but it is not true that one individual partner has either the legal or moral right to appropriate the copartnership effects to the payment of his individual debts, *without the assent* of his copartners. Such assent should be established by clear, indubitable evidence, in order to bind the other copartners. To establish the rule as contended for by the plaintiff in error in this case, would be a dangerous and mischievous precedent, and contrary to the decision of this Court in Harlow vs. Rosser, Scurry & Co., 28th Ga. Rep., 219. See also the case of Dob. vs. Halsey, 16th John. Rep., 34.

Let the judgment of the Court below be affirmed.

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WILLIAM A. RAWSON, plaintiff in error, vs. WILLIAM F. DAVIS, Sheriff, JOHN W. JONES, et al., defendants in error.

(Judge HARRIS did not preside in this case.)

When an execution has been levied on the property of the defendant sufficient to pay the debt, and afterwards such levy is dismissed by the plaintiff without the sale of the property, the mere fact of the dismissal of the levy by the plaintiff, when shown to have been unproductive, does not destroy the lien of his judgment and postpone the same in favor of junior judgment creditors.

Rule against sheriff and motion to distribute money. Decided by Judge CLARKE. Randolph Superior Court. November Term, 1867.

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Rawson vs. Davis, Jones, et al.

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This case came up upon an agreed statement of facts, and without the record.

William F. Davis, sheriff, had certain money arising from the sale of the property of Seaborn A. Smith, and William A. Rawson wished to have it applied to a *fi. fa.* which he held by transfer from Bemis & Prescott, plaintiffs in *fi. fa.*, vs. said Smith, to the exclusion of the *fi. fa.* which had brought the money into court, and certain other *fi. fas.* These were all younger than Rawson's *fi. fa.*, but it was contended that Rawson's *fi. fa.* was in law paid off, or that plaintiffs in that *fi. fa.* had abandoned their lien. Upon this issue was joined.

It was agreed that the Judge should hear the evidence and decide the matter without a jury.

The Bemis & Prescott *fi. fa.* issued from Randolph Superior Court, and was returnable to its May Term, 1856. It called for \$2,300, with \$—— interest and \$—— costs. In 1858 it had been levied on a house and lot in Cuthbert, and also on slaves (admitted by counsel to have been at the time sufficient in value to have paid the same.) On the 5th November, 1858, the defendant had paid Bemis & Prescott \$765, and they receipted for it on the *fi. fa.* On the same day the sheriff wrote on the *fi. fa.* a dismissal of the levies, reciting that he had dismissed them without a sale of the property, by order of the plaintiffs. And on the same day plaintiffs transferred the *fi. fa.* to Rawson.

The plaintiffs in the junior judgments examined SMITH, the defendant in the *fi. fas.*, who testified: that he paid Rawson \$200, for which he took no receipt, and which had not been credited on the *fi. fa.*; that the levies were dismissed by Bemis & Prescott and not by Rawson, to whom the *fi. fa.* was afterwards transferred; he did not pay Bemis & Prescott anything for dismissing the levies, the \$200 paid Rawson was for holding up the *fi. fa.* for twelve months after he had arranged for taking the transfer, and knew what he paid. The money was paid and transfer made and the levies dismissed at the same time, plaintiffs, defendant and Rawson all being present and understanding the arrangement.

RAWSON testified: that he paid in full to Bemis & Pres-

cott what the *fi. fa.* called for at the date of the transfer ; that the levies had been dismissed before the transfer ; nothing was paid for said dismissal, but Smith paid Rawson some money (he did not remember how much) in consideration of his holding up the *fi. fa.* for twelve months.

The Court held that the junior judgments should take the money in preference to the older judgment, and of this Rawson complains.

H. FIELDER, for plaintiff in error, cited §§ 3584, 5853 of the Code.

W. D. KIDDOO, HOOD, C. D. WOOTTEN, for defendants in error.

WARNER, C. J.

The error assigned to the judgment of the Court below in this case, is in deciding that the junior judgment creditors were entitled to the money, to the exclusion of the older *fi. fa.* The *fi. fa.* in favor of Bemis & Prescott, was levied upon the defendant's property sufficient to satisfy the same. On the 5th day of November, 1858, the defendant paid part of the money due on the *fi. fa.*, and the plaintiffs ordered the levy to be dismissed, the sheriff making the following entry on the *fi. fa.*: "Levy dismissed by order of the plaintiffs *without a sale of the property.*" Subsequently the *fi. fa.* was transferred by the plaintiffs to Rawson, and the defendant paid him two hundred dollars for twelve months' indulgence thereon, which was not credited on the *fi. fa.* Upon this statement of facts, it is insisted that Rawson's *fi. fa.* lost its lien upon the defendant's property, and should be postponed in favor of the junior judgment creditors of the defendant. By the 3607th section of the Revised Code, it is declared that "A levy upon personal property sufficient to pay the debt, *unaccounted for*, is *prima facie* evidence of satisfaction to the extent of the value of such property, and the dismissal of a levy *unexplained* is an abandonment of the lien so far as third persons are concerned." The levy made on the defendant's property

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Rawson vs. Davis, Jones, et al.

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is accounted for; it was dismissed by order of the plaintiffs *without a sale thereof*. The dismissal of the levy on the execution is also accounted for, or rather *explained*, so far as to show that it was not satisfied out of the defendant's property. When a levy has been made on the defendant's property and dismissed, it must be shown that the execution was *not satisfied thereby*; for if it is *unexplained*, it will be considered as an abandonment of the lien, so far as third persons are concerned. In this case it was explained, and shown that the execution was not paid off or satisfied, either by the *money or property* of the defendant. A levy upon property, or the dismissal of a levy may be accounted for or explained, as any other facts may be explained. The question in such cases to be settled is, whether the execution has in fact been satisfied, either by the money of the defendant or his property. In the absence of proof to the contrary, the legal presumption is that it has, when the levy is not *accounted for*, or the dismissal of the levy is not *explained*; but like any other legal presumption, it may be rebutted by the *facts of the case*. In Ryan vs. Lieber, (30th Ga. Rep., 433,) this Court held that the levy of an execution on personal property, which has been dismissed by the plaintiff or his attorney, without being *productive*, and when no injury has resulted from such dismissal, sufficiently accounts for and explains such levy, to authorize the plaintiff to proceed with its collection, and to enable it to participate in the distribution of a fund in court, raised from the sale of the defendant's property, according to its priority. This, in our judgment, is a fair and *practical* exposition of the rule applicable to such cases. What good reason can be given, why a plaintiff who has levied his execution upon the defendant's property, and dismissed it, either from motives of humanity or otherwise, without obtaining *satisfaction thereof*, should lose his lien? The two hundred dollars paid by Rawson in this case, was not paid to him to *release* the property of the defendant. The levy had been dismissed by the plaintiffs before the execution was *transferred* to him; the money was paid to him after he became the owner of the execution, by the defendant, for *indulgence*,

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and did not affect his judgment *lien* upon the defendant's property. According to the facts presented by this record, the *fi. fa.* controlled by Rawson had not lost its lien upon the defendant's property, and should not have been postponed in favor of the junior *fi. fas.* against the defendant.

Let the judgment of the Court below be reversed.

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SAMUEL MONTGOMERY, plaintiff in error, vs. WILLIAM WALKER and SARAH WALKER, defendants in error.

Where a bill was filed by a complainant who alleged that he was the sole heir-at-law of a deceased intestate, praying for an injunction to restrain a temporary administrator from wasting the estate pending the litigation for permanent letters on the estate of the decedent, alleging that he had been informed and believed that the security on the temporary administrator's bond was insufficient, and that the defendant was insolvent; which prayer for injunction the chancellor refused to sanction upon the ground that the complainant had an adequate common-law remedy, by requiring the temporary administrator to give additional security upon his bond: *Held*, that this Court will not control the discretion of the chancellor in refusing the injunction upon the statement of facts contained in complainant's bill; the more especially as the charges made of waste and fraud on the part of the defendant, are general, without stating any particular *acts of waste* by the defendant, or any particular *acts of fraud* done by him.

Equity. Injunction. Decided by Judge IRWIN. Chambers. Gilmer County. June, 1867.

Montgomery averred in his bill as follows: William R. King, of Gilmer County, Georgia, died in July, 1865, intestate, leaving no widow, nor child, nor lineal heir; he died, seized and possessed of estate real and personal, viz: his plantation in said county, containing three lots of land of one hundred and sixty acres more or less, each, with tenements and improvements thereon worth \$3,000, or other large sum, and worth for rent annually \$200; cows, hogs, household and kitchen furniture worth say \$100; notes, &c., worth say \$1,300, and specie, say about \$1,800.

Complainant was deceased's half brother and his next of kin and heir-at-law, and therefore entitled to the estate and the administration. If other whole or half brothers were living, complainant did not know it; if they were, they will take equally with him.

When King died, Sarah Walker was living on his plantation, and with her complainant, after said death, agreed that she would remain there and take care of the property unmo- lested, till complainant could go to his home in Lumpkin County, Georgia, and prepare to take possession in person as administrator. Notwithstanding this agreement, she and her son William Walker, and others unknown to complainant, collectively combined and confederated together, wickedly intending to injure and defraud complainant of his said right of inheritance and administration, and to waste and destroy the property of deceased, and to sell, use and dispose of it to their own use; without complainant's consent, immediately after said death, they took possession of all of said property and converted it to their own use.

Complainant is informed and believes they intend perpetu- ally and effectively to prevent him from the enjoyment of said property, and keep the same for themselves; for this purpose William Walker applied to the Court of Ordinary of Gilmer County, "under false pretences and without the knowledge or consent of complainant," and obtained there- from, "by false representations," temporary letters of admin- istration on said estate "for the purpose, as he believes, the more effectually to damage" complainant, and "to commit devastation on said estate under cover of authority." Com- plainant believes that the security on this administration bond "is wholly insufficient."

After said temporary letters were granted, complainant ap- plied to said Court for permanent letters of administration on said estate, and obtained them over the protest of said Wil- liam Walker; from this judgment of the ordinary, William Walker, with such fraudulent purpose, has appealed to the Superior Court, and the appeal is still pending. (A copy of said proceedings in the Court of Ordinary, is shown as an

exhibit to the bill. The exhibit shows that on the 8th of January, 1866, complainant's attorney then objecting, these temporary letters were granted, and on the 9th of January, 1866, complainant was appointed permanent administrator, and William Walker appealed from said judgment.) This appeal was taken without good cause, only to keep possession of the property, and, as complainant believed, without sufficient bond and security.

They conceal said specie and personal effects from complainant, refuse to take any account of the same, or make any report to the Court of Ordinary, they refuse to deliver the property to complainant, or to pay him the rents, issues and profits thereof. He is informed and believes that they are insolvent, and their bonds insufficient and inadequate for securing complainant against loss.

The prayer is that this bill be taken as ancillary to the proceeding to obtain letters of administration; for injunction restraining them from selling, removing or disposing of or using said property; further, that they be compelled to give additional security, and on failure so to do, that complainant shall take possession of the property, giving bond and security under the order of the chancellor; that they account and pay over to him the proceeds of any of said property already disposed of, and deliver to him said property with its rents, issues and profits, &c.

The Court refused the injunction, on the ground that complainant's remedy was complete at law, and for this complaint is made here.

WEIR BOYD, for plaintiff in error.

H. P. BELL, for defendant in error.

WARNER, C. J.

This was a bill filed by the complainant against the defendant as the temporary administrator of William R. King, deceased, and Sarah Walker, praying for an injunction to restrain them from wasting and destroying the property of



the intestate, pending the litigation for permanent letters of administration in the Superior Court, and that the temporary administrator be required to give additional security, and upon failure to do so, that the possession of the property be given to the complainant, upon his giving bond and security therefor. The chancellor refused to grant the injunction as prayed for, and the complainant excepted, and now assigns the same for error here. From the facts disclosed by the record, we are not disposed to control the discretion of the chancellor in refusing this injunction. The defendant has been appointed by the Ordinary temporary administrator, and as such, is entitled to the possession of the intestate's property until the contest for permanent letters shall be decided. The temporary administrator is required to give security. Revised Code, section 2452. If such temporary administrator is wasting or in any manner mismanaging the estate, or his sureties are likely to become insolvent, or for any reason he is unfit for the trust reposed in him, the Court of Ordinary can require additional security, revoke the letters, or pass such other order, as in its judgment may be expedient. Revised Code, section 2472. The charges of *fraud* in the bill are general, without alleging *specific* acts, which, in view of a court of equity, might or might not amount to fraud; and the same remark is applicable to the charge of *waste*. It is not sufficient to make a charge of fraud in general terms in a bill; but it should point out and state *particular acts of fraud*. Story's Eq. Pleading, 211, section 251. If the security upon the temporary administrator's bond is insufficient to protect the estate, he can be required to give additional security.

Let the judgment of the Court below be affirmed.

THE LIVERPOOL COTTON COMPANY, plaintiff in error, *vs.*  
THEODORE WISEMAN, defendant in error.

When the transcript of the record from the Court below is not sent up to this Court as required by the provisions of the Code, unless good and sufficient cause be shown for the delay, upon filing the proper certificate of the facts, the judgment of the Court below will be affirmed.

Motion to dismiss writ of error and for damages. Sumter Superior Court. April, 1867.

Wiseman procured judgment against the Liverpool Cotton Company for \$4,300, at April Adjourned Term, 1867, of Sumter Superior Court. On the 4th June, 1867, the Company sued out writ of error to the Supreme Court and gave a bond superceding the judgment.

It was shown by a certificate of the Clerk of the Superior Court of Sumter county, that the attorney for the plaintiff in error, when he filed the bond, instructed the Clerk not to make out a copy of the original bill and record, saying he did not think he would carry up the case as it would likely be settled, and that if it was not settled he should have notice in time to prepare the papers for the Supreme Court.

The attorney gave the Clerk no notice till about the middle of the last morning for making up the papers. The Clerk then replied to him, that he then had not sufficient time, because it would require two days work to prepare the record. The attorney said that the case would have to go by. So the case was not sent up.

Wiseman's attorneys came with the record and said certificate and asked that the judgment below be affirmed, and for certificate for damages, as in cases brought up for delay.

COBB & JACKSON and W. A. HAWKINS, for this motion.

No appearance, contra.

WARNER, C. J.

As there has been no transcript of the record from the

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Court below sent up to this Court for the reason stated, let the judgment be entered affirming the judgment of the Court below. We are not quite sure that damages ought not to be awarded in this case for delay, but as the times are rather stringent in the way of money facilities, we will withhold the certificate for damages. This case is not, however, to be considered as a *precedent* for parties, to experiment upon the indulgence of this Court for delay, without incurring damages therefor.

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JAMES M. FIELD, plaintiff in error, vs. DAWSON A. WALKER, defendant in error.

NOTE.—Judge Walker being a party in this case, did not preside,

When a plaintiff as indorsee instituted suit on a promissory note, signed by three defendants as principal makers thereof, and one of the makers died pending the suit, and there being no legal representative of his estate before the court, but the case was proceeding against the living parties only, two of the defendants having filed the plea of *non est factum*, and offered themselves as witnesses under the statute of 1866, to prove that the dead party had no authority to sign their names to the note either as partners or otherwise: *Held*, that however it might have been, if the representative of the deceased party had been before the Court, so as to have bound the estate of the decedent by the judgment thereof: yet, as the case was proceeding only against the *living parties*, and the judgment to be rendered would only bind them, the defendants were *competent* witnesses against the plaintiff under the statute.

Complaint and motion for new trial. Decided by Judge MILNER. Murray Superior Court. April Term, 1867.

Walker brought complaint on promissory notes, against J. T. Field, James M. Field and S. E. Field as makers, and Robert McClure as security. James M. and S. E. Field plead *non est factum*.

The verdict was for \$1300.00, with interest and costs.

Several points were made during the trial, but none of them are material to the report of this case, except as follows :

James M. Field and S. E. Field were offered as witnesses to testify that Jeremiah T. Field was not authorized by them, or either of them, to sign their names, or the name of either of them to said notes, and that no partnership ever existed between them, or either of them, and J. T. Field for any purpose whatever. It being conceded that J. T. Field signed the notes and was dead, the Court refused to allow them to testify as to deceased's said authority. Deceased's representative was not a party to the case.

Upon this (and other grounds,) said James M. Field moved for a new trial. The Judge refused the new trial, and this is assigned as error.

W. H. DABNEY and J. A. JOHNSON, for plaintiff in error.

C. D. McCUTCHINS, for defendant in error.

WARNER, C. J.

This was an action brought by the plaintiff in the Court below as the indorsee of a promissory note, against J. T. Field, S. E. Field, J. M. Field as principal makers thereof, and Robert McClure security. Pending the suit, J. D. Field died, and there was no representative of his estate before the Court at the time of the trial. The case proceeding against the other defendants, two of whom, (to-wit,) S. E. Field and J. M. Field, had filed the plea of *non est factum*. At the trial of the case, the two last named defendants were offered as witnesses in their own behalf under the statute, to prove that J. T. Field had no authority from them as partners, or otherwise, to sign their names to said note. Their evidence was rejected by the Court, on the ground that J. T. Field, one of the parties to the note, was dead. This ruling of the Court was excepted to, and is now assigned for error here. The decision of this question requires us to give a construction to the Act of 1866, embraced in the 3798th section of the Revised Code. By the general enacting clause of the Act it appears to have been the intention of the Legislature, to make *all parties* to any suit pending in Court, *competent*

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witnesses, unless they shall come within the *exceptions* provided by the Act. One of the exceptions provided by the Act is, "where one of the original parties to the contract, or cause of action in issue, or on trial, is dead," in that case, "the *other party* shall not be admitted to testify in *his own favor*." If two parties make a contract, and afterwards one of them dies, and the terms or validity of that contract shall be in issue or on trial before the Court, the other living party to that contract cannot be a witness in *his own favor*. The obvious reason of the exception is, that the living party to the contract shall not be permitted to testify in his own favor, as to the terms or conditions of that contract, when the voice of the other party is hushed in death, and *cannot be heard*. Now, how did the parties stand in this case towards each other in the Court below? The plaintiff stood on one side prosecuting his claim against the living defendants, S. E. Field, J. M. Field, and Robert McClure. J. T. Field's representative was not before the Court, if indeed he had any, and his estate could not in any manner be affected by the judgment to be rendered in the case. The parties then who were litigating the contract, or cause of action in issue, or on trial before the Court, whose rights were to be affected by the judgment were all in life, and competent witnesses against each other under the Act. The plaintiff was a competent witness against the *living* defendants, (and none others were before the Court,) and the defendants were competent witnesses against the *living* plaintiff. If the representative of J. T. Field had been a party before the Court, and the effect of the evidence offered had been to exonerate S. E. Field and J. M. Field from liability by their own testimony, and to make the dead man's estate liable for the whole debt, then there might have been some reason for rejecting their evidence, for the issue on trial then would have been, whether his estate should pay the whole debt or only one-third part of it. Those only who were interested in protecting the dead man's estate from the effect of the evidence offered, as to his acts while in life, touching the contract, had the right to object to the evidence. The defendants could not be wit-

nesses in *their own favor*, to show that the dead man, J. T. Field had no authority from them while in life, to execute the note so as to make his estate liable for the whole debt. If the representative of J. T. Field had been before the Court, he would have had the right to object to the evidence, because his intestate was one of "the original parties to the contract or cause of action in issue or on trial," and was dead. The effect of the evidence offered by S. E. Field and J. M. Field, was to exonerate themselves from liability to pay the note, and to make the estate of J. T. Field liable to pay the full amount of it; they would have been testifying in *their own favor* as to the contract, and *against* the interest of the dead man's estate. But the representative of J. T. Field was not before the Court, and whatever might have been the judgment of the Court in this case, his estate would not have been bound by it. The parties litigating before the Court, and who would have been bound by its judgment, were all *living*, both the plaintiff and the defendants, and were therefore *competent* witnesses under the statute, for and against each other. Let the judgment of the Court below be reversed.

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WM. G. PRICE, adm'r, *et al*., plaintiff in error, vs. LORENZO D. MUNROE, defendant in error.

When a *certiorari* is applied for under the provisions of the Code which does not require the sanction of a Judge, a notice to the adverse party that a petition for a writ of *certiorari* has been filed in the Clerk's office of the Superior Court, for the removal of a case from a Justices Court to the Superior Court, will be sufficient.

*Certiorari* from Justices Court. Decided by Judge VASON. Calhoun Superior Court. March Term, 1866.

Munroe sued Nancy Price and William G. Price as administrator of William Price, deceased, in eleven different suits on as many \$50 notes, in the Justices Court.

Defendants plead tender and *plene administravit*.

Price, Adm'r, *et al*, *vs.* Munroe.

At the trial two witnesses testified that they saw defendant tender plaintiff money in payment of these notes; they thought it was Confederate money, and knew not how much he tendered; it was in the fall of 1864; plaintiff refused to take the money.

The Ordinary's books were introduced to support the plea of *plene administravit*, but what they showed does not appear by the record.

The jury found for the defendants.

Munroe *certiorated* the cases, alledging, "that the verdict of the jury was contrary to law and evidence, in this that the jury found for your petitioner, but finding they could not bind the assets of the estate alone, they found against (him,) when he ought to have had a verdict at law against Nancy Price and Wm. G. Price as administrator, and the securities on appeal, who were W. E. Griffin and Robert Adams, and also he should have had a verdict against the administrator because he failed to support his plea of *plene administravit* and tender."

The *certiorari* was filed in the office of the Clerk of the Superior Court on the 21st of September, 1866.

The following notice was served, (it does not appear when :)

" L. D. MUNROE,

*vs.*

WM. G. PRICE, adm'r of

Wm. Price, dec'd,

And NANCY PRICE.

} Verdict for defendant in Justices  
Court, 1123d District G. M.

To P. J. DUNN, attorney for Wm. G. Price, adm'r of Wm. Price, dec'd, and Nancy Price.

SIR—Please take notice that I have this day filed in the office of Clerk of the Superior Court of Calhoun County, a petition for a Writ of *Certiorari* in the above stated case, which said *certiorari* will stand for trial at the March Term of said Court, 1867.

L. D. MUNROE, Petitioner's Att'y."

When the case came on for hearing in the Superior Court

defendant's attorney moved to dismiss the petition and writ of *certiorari*, because 1st, said notice was insufficient in law, or not the notice required by law. 2d, The petition did not plainly and distinctly set out the causes of error complained of, no error being set out.

The Court over-ruled the motion.

Plaintiff's attorney moved to amend the petition by adding to it a copy of said notes. This the Court allowed.

After argument the Court sustained the *certiorari* and ordered a new trial.

His refusal to dismiss, the allowance of the amendment and the granting of a new trial, are assigned as error.

DUNN, LYON, DEGRAFFENREID and SHORTER, for plaintiffs in error.

HOOD and L. D. MUNROE, Jr., for defendant in error.

WARNER, C. J.

This was an application for *certiorari* under the provisions of the 3980th section of the Revised Code, from the decision of a Justices Court. The petition was filed in the Clerk's office as required by the Code, and the Clerk issued the writ of *certiorari*, directed to the Justice whose decision was complained of, who made his return in obedience thereto. The plaintiffs gave the defendant notice that he had *filed* in the Clerk's office his petition for writ of *certiorari*, and that the same would stand for trial at the March Term of the Court, 1867. A motion was made in the Court below to dismiss the *certiorari* upon the ground, that the notice of *filing* the petition for *certiorari* in the Clerk's office, was not a sufficient notice under the law, and not the notice required by law. The Court over-ruled the motion and defendant excepted. We think the notice given of the *filing* the petition for *certiorari* was sufficient under the law, in this case. When a *certiorari* is applied for under the provisions of the Code, other than from the decision of the Inferior Court, and Court of Ordinary, which require the *sanction* of the Judge, no notice



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Stix & Co., vs. Pump & Co.

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of the *sanction* of the writ of *certiorari* is required; but a notice that a petition for a writ of *certiorari* has been *filed* in the office of the Clerk of the Superior Court for the removal of a case from a Justices Court to the Superior Court, is a sufficient notice under the law; the *sanction* of the Judge not being required to the writ in such cases, notice thereof is not necessary. To correct the errors in a Justices Court a *certiorari* is obtained by *filing* a petition therefor in the Clerk's office. To correct the errors in the Inferior Court or Court of Ordinary, the *sanction* of the Judge is required, and *notice* of such sanction, must be given. In the one case, notice of the *filing* the petition must be given; in the other, notice of the *sanction of the writ*.

The grounds of error were sufficiently set forth in the petition to enable the Court to understand and decide upon them. The Court below also had the discretion to allow the amendment. We find no error in the judgment of the Court ordering a new trial in the case.

Let the judgment of the Court below be affirmed.

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LOUIS STIX & Co., plaintiffs in error, vs. S. PUMP & Co.,  
defendants in error.

1. This Court will not control the discretion of the Court below in refusing to continue a case, when the party applying therefor fails to state *any material fact* which he expects to prove by the witness whose evidence he seeks to obtain, applicable to the issue on trial before the Court.
2. When the Court charged the jury upon the trial of an issue as to the truth of the plaintiff's affidavit in suing out an attachment, "that if they believed from the testimony, that the defendants were not about to remove beyond the limits of the county on the 14th day of December, 1866, the day on which said attachment was sued out, then they must find the issue in favor of the defendants." *Held*, that although the charge of the Court was too *stringent* in confining the inquiry of the jury to the *precise day* on which the attachment was sued out, yet, the verdict being right under the evidence contained in the record, a new trial will not be granted for that error in the charge of the Court.

Traverse of attachment affidavit. Tried before Judge WORRILL. Muscogee Superior Court. May Term, 1867.

On the 14th of December, 1866, Louis Stix & Co., in said county, sued out attachment against Simon Pump, David Marks, Isaac Marks and Jacob Marks, partners under the firm name of S. Pump & Co., on the ground that said defendants were indebted to them \$5,027.96, and that they were about to remove beyond the limits of said county. The attachment was levied on certain goods, and at the return-term, the defendants, by their attorneys, traversed said ground. Upon this issue was joined. When this issue came on for trial, on the appeal, plaintiff's attorneys moved for a continuance upon the ground that "plaintiffs reside in Cincinnati, Ohio; about September or October last, plaintiffs sold to defendants bills of goods amounting to something like \$14,000 or \$15,000, some on thirty days' and some on four months' credit—defendants were selling goods at Memphis, Tennessee, and Columbus, Georgia; that the firm of S. Pump & Co. consisted of S. Pump, David, Isaac and Jacob Marks; Isaac and Jacob attended to the business in Columbus, and S. Pump and David Marks resided at Memphis and attended to the business there; that said David was the father of said Isaac and Jacob; that said David and Pump were the leading and controlling members of the firm; Isaac and Jacob were young men and came to Columbus some time in 186—; that the defendants formerly resided in Cincinnati: that plaintiffs, early in December last, heard a rumor that S. Pump & Co. had sold out their goods; one of the plaintiffs, Swartz, started immediately to Memphis to look after their claim; could not get an interview with the Memphis partners; came immediately to Columbus and saw said Isaac and Jacob. He pressed them for some settlement of his claim, they said their father and Pump had sold out the entire stock of goods to one Wolf, but they knew nothing of the terms of the sale, the proceeds of the sale had all been sent to their father in Memphis, and referred Swartz to him for information; they said their father and Pump managed the whole business, and they

regretted their condition ; that as soon as they could get over their embarrassments, they had no doubt but the entire claim would be settled, and further that they were then out of business and would leave Columbus as soon as they could get employment elsewhere. Swartz returned to Memphis, had an interview with David Marks, was told by him that they had sold out the stock of goods, but gave him little satisfaction as to the terms of the sale, the amount received, or what had become of the money. That on the 14th of December, 1866, he sued out said attachment returnable to March Term of the County-Court. Sometime before that Court defendant's counsel took out interrogatories for David Marks, M. Wolf and S. Pump, which were fully crossed by plaintiff's attorneys for the purpose of proving a full discovery from said parties as to the entire transaction, as well as to the relationship, ages and residence of all the members of the firm, that counsel for defendants informed counsel for plaintiffs that said interrogatories had been forwarded to Memphis for execution, and afterwards, and about the time of the session of the County-Court, defendants' counsel informed them that they had information from Memphis that said interrogatories had been executed and mailed, and were on their way here.

That they, relying on the facts as to said interrogatories having been mailed, were satisfied that the answers to them would contain all the discovery which they could get from said defendants, and therefore they did not sue out interrogatories for themselves for defendants ; four or five days before the time of the Court then in session, defendants' counsel told them that the interrogatories had not come to Columbus, but were probably lost in the Western rivers in March last. They then at once took out interrogatories for said witnesses, which were crossed by defendants' attorneys on the first day of this term, and on that day they were forwarded to Memphis for execution, and they had not been returned. The application was not for delay, but for a full discovery from defendants and M. Wolf.

When asked what they expected to prove by the witnesses, they stated that they could not state exactly what particular

facts they would expect to prove by them, because Swartz had said that in his interview with the parties, they declined to give him any satisfactory information about the transaction. It farther appeared that the interrogatories first mentioned were taken out in the case of M. Wolf, and not in this case. Defendants' attorneys offered to consent to a continuance if plaintiffs' attorneys would state that they expected to prove by either of said witnesses any fact showing that defendants were about to remove. Plaintiffs' attorneys replied that they would only say they hoped to prove something. The Court refused the continuance.

The trial proceeded, and the following testimony was adduced.

Said SWARTZ testified : that said Isaac and Jacob told him they had nothing to do at Columbus, knew not where to go or how to make a living, that one of M. Wolf's men was keeping the store at Columbus, that they would move away as soon as they could find a place to work in, but they did not say when they would leave Columbus or where they would go, they said they did not know. They said they knew not how much was gotten for the stock. All this was on the 14th December, 1866.

JACOB MARKS testified : that he did not tell Swartz he intended to leave Columbus, &c., as above : that he did not intend to move out of said county, but in fact had, on the 11th of December, 1866, made arrangements with Ullman, agent of Wolf, to remain permanently at Columbus and clerk for Wolf. He swore that he did not tell Grigsby E. Thomas, Jr., that he and his brother Isaac were not going to leave Columbus till the week after the 14th of December aforesaid.

ISAAC MARKS testified substantially and almost literally the same as Jacob had testified to. He said he never heard said agent of Wolf say to said Thomas, that he and his brother Jacob would not leave Columbus until the week after said 14th of December.

ULLMAN testified : that he came to Columbus about the last of November, 1866, as agent of Wolf, who had bought out

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Stix & Co., vs. Pump & Co.

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the store of S. Pump & Co., in Columbus ; as such agent, he employed Isaac and Jacob, on the 11th of December, 1866, to clerk in Columbus for Wolf. Said Thomas came into the store about the 14th of December, 1866, asked for Jacob and Isaac ; he told Thomas they were not in, but did not, to his knowledge, say they would not leave Columbus until the week after the 14th of December, 1866.

Said THOMAS, in rebuttal, testified : that he had a claim against S. Pump & Co., went into what he thought was their store, saw Ullman, asked for Isaac and Jacob, Ullman said nothing but pointed to the sign, "M. Wolf, Successor to S. Pump & Co." He said to Ullman that he heard Isaac and Jacob were going away ; Ullman replied that they were not going "this week," would not go "until next week." No one else was present but himself and Ullman, it was on the 14th of December, 1866.

SWARTZ was reintroduced, testified more particularly but substantially to nothing additional to his testimony aforesaid.

The Court charged the jury as appears by the motion for new trial.

The verdict was for S. Pump & Co.

Plaintiffs' attorneys moved for a new trial on the grounds that the Court erred in overruling said motion for a continuance, in charging the jury that if, from the testimony, "they believed defendants were about to remove from the County of Muscogee on the 14th day of December, 1866, the day on which said attachment was sued out, then they must find the issue in favor of the plaintiff ; but on the other hand, if the jury believed from the evidence, that the defendants were not about to remove beyond the limits of said county on the 14th of December, 1866, the day on which said attachment was sued out, then they must find the issue in favor of the defendants."

The Court overruled the motion, and this is brought up for review.

INGRAHAM, CRAWFORD & POU, for plaintiffs in error.

MOSES & GARRARD, for defendants in error.

WARNER, C. J.

The error assigned to the judgment of the Court below in this case, is in refusing the motion for a new trial on the grounds specified therein. We will not control the discretion of the Court below in refusing to continue the case, upon the statement of facts exhibited by the record. The failure of the plaintiffs' attorneys to state that they expected to prove by either of the witnesses any facts showing that the defendants were *about to remove*, was sufficient to sustain the judgment of the Court upon this point. The question in issue then before the Court to be tried, was whether the defendants were *about to remove*.

The Court charged the jury, "that if they believed from the testimony, that the defendants were not about to remove beyond the limits of the county on the 14th day of December, 1866, *the day on which said attachment was sued out*, then they must find the issue in favor of the defendants." We think the charge of the Court was rather too *stringent* in confining the inquiry of the jury to the *precise day* on which the attachment was sued out; for the party may, by his acts and conduct, show his *intention* to remove the day before suing out the attachment, or *about that time*. Did the evidence show that the defendants were about to remove from the county on that day or about that time, so as to authorize the plaintiffs to take out an attachment on that day? Whether the plaintiffs are authorized under the statute to sue out an attachment on the ground stated, depends upon the acts and conduct of the defendants, showing their *intention* at or about the time the attachment is taken out. The verdict in this case being right under the evidence contained in the record, we will not reverse the judgment in refusing to grant a new trial.

Let the judgment of the Court below be affirmed.

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The Southern Express Company *vs.* Barnes, &c.

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THE SOUTHERN EXPRESS COMPANY, plaintiff in error, *vs.*  
 GEORGE T. BARNES, trustee for his WIFE, defendant in  
 error.

A common carrier, according to the law of this State, cannot limit his legal liability as such, imposed upon him by that law, by any notice given either by publication, or by entry on receipts given for the goods or tickets sold; but he may make an express contract with the shipper of the goods, which may be proved outside of the receipt given therefor, and will then be governed thereby.

Assumpsit, &c. Tried before Judge GIBSON. Richmond Superior Court. June adjourned Term, 1867.

Barnes, as trustee for his wife, averred that on the — day of April, 1862, John Kerr, of Memphis, Tennessee, delivered to the Southern Express Company at Memphis, (they being common carriers between Memphis and Augusta, Georgia,) a package containing \$1,160.73, in Confederate States treasury notes, worth that sum of money, which were the property of Barnes' wife, addressed to Dr. L. A. Dugas, Augusta, Georgia, for said wife; that they accepted it as common carriers, &c., but failed to deliver it, &c. The plea was general issue.

Evidence as to the delivery of the package to the Express Company, was introduced on both sides. Plaintiff's witness testified that he took a receipt for the package, and that the receipt was lost or destroyed. On 6th June, 1862, Memphis was cut off from Augusta by the Federal army, and consignee (and plaintiff) knew nothing of the bailment until 27th October, 1865. It was admitted that no demand was made on the Company for the package, or for payment for its non-delivery, till November, 1865.

The plaintiff having closed, the defendant offered the following form of receipt, (after proving that it was the form of their receipts in April, 1862,) :

"SOUTHERN EXPRESS COMPANY.

Memphis, ———.

Received of ——— package, sealed and said to contain ———, addressed ———, to be forwarded as ad-

dressed. It is agreed, and is a part of the consideration of this contract, that the Southern Express Company is not to be held responsible except as forwarders, nor for any loss or damage arising from the dangers of railroad, ocean, steam or river navigation, fire, &c., unless specially insured and so specified in this receipt, and in no event to be held responsible for the safe transportation of the articles herein receipted for, after the same shall have been delivered to other parties, which the Southern Express Company is hereby authorized to do, for completing the transportation or delivery, nor is it to be liable for any loss or damage whatever, unless claim be made therefor within ninety days from its delivery to it."

(Signed by the Agent.)

After argument<sup>t</sup> defendant's attorneys requested the Court to charge the jury, that that receipt was the contract between the parties, and that unless notice of the claim was given to defendants within ninety days, according to the terms of the receipt, the plaintiff could not recover. The Court refused so to charge, but charged that plaintiff was not bound by the terms of said receipt.

The verdict was for \$600.42 in gold, with interest from 15th November, 1865, and costs, against defendant.

The defendant assigns as error the charge of the Court, and the refusal to charge as aforesaid.

WILLIAM T. GOULD, for plaintiff in error.

JOSEPH B. CUMMING, for defendant in error.

WARNER, C. J.

This case was argued in connection with the case of the Southern Express Company vs. Edward B. Purcell,\* and the same question made in this case as in that, in regard to the receipt of the defendant, *limiting his legal liability therein* as a common carrier. The same ruling of the Court in that case applies to this case, and must be controlled by it, so far as that question is concerned. That being the only question involved in this case, the judgment of the Court below is affirmed.

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\* Q. V.—*post*.



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Sands vs. Marburg.

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MARY A. SANDS, plaintiff in error, vs. MICHAEL MARBURG,  
defendant in error.

When goods were sold and delivered to a married woman living separate and apart from her husband in the State of Tennessee, on her individual credit, and it appearing upon the face of the bill that by the laws of that State she was considered as a free dealer: *Held*, that she might be sued in equity in the Courts of this State, and be restrained by injunction from making a fraudulent transfer of goods in her possession, for the avowed purpose of defeating the claim of her Tennessee creditor, who had no adequate legal remedy against her to recover his demands.

Bill for Injunction. Demurrer. Decided by Judge WARNER. Fulton Superior Court. April Term, 1867.

Marburg's bill made the following case: Mary A. Sands owed him \$3,753.36 for goods, wares and merchandise sold to her, (of which he gave a bill of particulars). She refuses to pay any part of it, and threatens, if he sues her or institutes any legal proceedings to collect his claim, to immediately transfer or assign all her property, so as to defeat the collection of his claim; she then had at the depot of the Macon and Western Railroad Company in Atlanta, Georgia, in packages and boxes, a large quantity of goods, wares and merchandise worth \$4,000, or other such sum; he knew not what she intended to do with said goods, but believed she would do anything with them, necessary to defeat his rights. He avers that she cannot be held to bail, that he cannot attach the goods, and prays a discovery as to the allegations aforesaid, and injunction against her transferring, assigning or otherwise putting said goods out of her possession, or out of the reach of legal process.

The bill was sanctioned, injunction was issued and served. Defendant demurred generally.

Before argument, and by leave of the Court, and without prejudice to the injunction, the bill was amended by the following averments:

The defendant was at Nashville in Tennessee, (she being the wife of one John E. Sands, of Kingston, Bartow County,

Georgia,) her husband became insolvent, and entirely failed to give any assistance towards the support of his wife and children; she, by her own labor and management, supported herself and children, and was abandoned by her husband, leaving her in Tennessee without any support; after separation, Marburg sold her on credit goods, &c., from time to time, until by her own labor and management she acquired good credit, and was enabled to buy goods in her own name in which her husband did not, nor, by the laws of Tennessee, could claim any interest; by the laws of Tennessee, goods acquired thus under such circumstances are not subject to the debts of her husband; she became indebted to plaintiff, as stated in the bill; that the contract was made while she was at Nashville, and while plaintiff lived there, and was performed at Nashville, Tennessee; that thus abandoned, she had left Tennessee and settled in Upson County, Georgia, and leaving her children there, had removed to Atlanta, Georgia; her husband has not, nor does he claim any interest in the said goods in her possession, has since abandoned her and gives her no assistance, is employed in a small store, and is wholly insolvent; by the use of goods which Marburg let her have, she bought, in her own right, a lot of cotton, and promised out of the proceeds to pay Marburg, she sold her cotton for a profit, bought other goods, and then had in Atlanta \$10,000 worth of goods in her own right, as a free dealer; she was considered and known to be in Tennessee; but she did not pay Marburg, and afterwards being in Nashville, she asked one person not to inform Marburg that she was in Nashville, and asked another to inform him that she had gone to Chattanooga, when in fact she had gone to Cincinnati; then Marburg threatened to sue, and she thereupon threatened to transfer her goods so as to defeat his claim, and did so, and sold her goods in Atlanta, seven hundred dollars' worth of goods for two hundred dollars.

He avers that her husband cannot be made liable for her goods, nor can they be sold for his debts, and asserts that she is not a proper party to the bill, praying, however, that

the Court should hold him to be a necessary party, time might be given for perfecting service upon him, and that she and her husband be enjoined as prayed for in the original bill.

To the bill as amended, the defendant again demurred generally.

The demurrer was overruled and defendant ordered to answer.

Plaintiff in error excepted to that ruling and order.

GLENN & SON, HENRY JACKSON, HAMMOND, MYNATT & WELBORN, for plaintiff in error.

A. W. HAMMOND & SON, for defendant in error.

WARNER, C. J.

The error assigned to the judgment of the Court below in this case, is in overruling the general demurrer to the complainant's bill. This was a bill filed by a creditor to restrain the defendant by injunction from fraudulently disposing of her goods to defeat his claim, under the peculiar state of facts stated therein,—and the question is whether a court of equity in this State has *jurisdiction* to do so. The debt of the complainant against the defendant was contracted in the State of Tennessee, where the bill alleges she was considered by the laws of that State as a *free dealer*. She not only threatened to dispose of her goods for the avowed purpose of defeating the collection of complainant's debt, but had actually sold at auction in the city of Atlanta, seven hundred dollars' worth of her goods for *two hundred dollars*. She not only contracted the debt with the complainant in Tennessee as a free dealer, but she was contracting and disposing of her goods in this State as her *separate property*. The complainant could not hold her to bail, nor sue out an attachment against her property; there she was in the city of Atlanta, openly threatening *fraudulently* to dispose of her goods to defeat the complainant's demand, and actually proceeding to do so by making sale thereof at auction for less than half the value of the same.

Was the complainant remediless in the Courts of this State? The 4119th section of the Revised Code declares, that "Any person who cannot sue at law may complain in equity, and every person who is remediless elsewhere may claim the protection of a court of equity, to enforce any right recognised by the law." By the 3149th section it is declared that equity, by a writ of injunction, may restrain the acts of private individuals, which are illegal or contrary to *equity and good conscience*, and for which no adequate remedy is provided at law. The granting and continuing of the injunction must always rest in the sound discretion of the Judge, according to the circumstances of *each case*. Revised Code, section 153. "Courts of equity constantly decline to lay down any rule which shall *limit* their power and discretion as to the particular cases in which injunctions shall be granted or withheld. And there is wisdom in this course, for it is impossible to foresee all the exigencies of society which may require their aid and assistance to protect rights or redress wrongs." 1 Story's Com. on Equity, 227, section 959. This extraordinary power of the Court, however, ought to be exercised with great caution, and applied only in very clear cases and in such manner as to prevent injustice and unnecessary delay.

In this case, the chancellor below allowed the injunction to be dissolved and the defendant restored to the possession of her lands, by giving bond and security to pay the eventual condemnation money in the complainant's suit. Taking the allegations in the complainant's bill to be true, as the general answer thereto admits, it was, in our judgment, properly so ruled.

Let the judgment of the Court below be affirmed.

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Green vs. Hall, Adm'r, &c.

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MOSES P. GREEN, plaintiff in error, vs. BENJAMIN F. HALL, administrator, *de bonis non, cum testamento annexo* of WILLIAM FULCHER, deceased, defendant in error.

By the Act of 1854, a credit entered on a promissory note in part payment thereof, after the statute of limitations has commenced running, in order to form a *new starting point* from which the statute will commence to run, must be *subscribed* by the party making it, or by some other person by him *lawfully* authorized to do so.

As the law stood at the time of the passage of the Act of 1854, it took effect from the date of its passage, and not from the time of its publication.

Complaint on Note. Statute of Limitations. Decided by Judge AUGUSTUS REESE. Richmond Superior Court. April Term, 1867.

This was complaint by Green against Hall in his said representative capacity, on the following promissory note :

"\$846.77.

October 10th, 1851.

One day after date, I promise to pay to M. P. Green, or bearer, the sum of Eight Hundred and Forty-six Dollars and Seventy-seven cents, in renewal of a note given by William Fulcher.

ANN C. FULCHER,

*Executrix."*

On which note was this endorsement :

"10th December, 1855.—Received of James A. Templeton for Ann C. Fulcher, executrix on the estate of William Fulcher, deceased, the sum of Two Hundred and Forty-four Dollars and Fifty-six cents,

M. P. GREEN."

At December Term, 1865, it was taken to the Superior Court by consent appeal. Subsequently at October Term, 1866, plaintiff's declaration was amended by adding a count, declaring that Ann C. Fulcher, as executrix of William Fulcher, deceased, was indebted to plaintiff \$846.77, on 10th October, 1851, for money had and received for the use and benefit of the estate of said deceased.

And again at January Term, 1867, plaintiff again amended

his declaration by alleging that said defendant in error, in his said representative capacity, was indebted to him, &c., on the following note :

" January 1st, 1843.

One day after date, I promise to pay Jesse P. Green, or bearer, Five Hundred and Ninety-three Dollars and Thirty-eight Cents, for value received.

WILLIAM FULCHER."

On this last note was a credit for \$75, dated 18th October, 1844.

The defendant plead *non assumpsit*; that the first note was the private undertaking of Ann C. Fulcher, and did not bind William Fulcher's estate; as to the last note, payment and as to the open account and both notes, the statutes of limitations applicable to each.

Before the jury was empanelled, by consent of counsel, to save time, a motion was made to exclude the note sued on from the jury, because it was barred by the lapse of time, there being no new promise in writing, as required by the Act of 1854.

The Court sustained the motion and ordered a verdict for the defendant.

This decision and order are assigned as error.

FRANK H. MILLER, for plaintiff in error.

JOHN T. SHEWMAKE, for defendant in error.

WARNER, C. J.

The error assigned to the judgment of the Court below in this case, is in deciding that the note sued on was barred by the statute of limitations. By the Act of 1854, the credit entered on the note, of part payment thereof, must be *subscribed* by the party making it, or some other person thereunto by him *lawfully* authorized, if made after the statute of limitations has commenced running, in order to revive the note, or to form a new starting point from which the statute may commence running. In this case the credit on the note

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was not subscribed by *the party* making it, nor does it appear that it was done by *her authority*—the credit on the note is subscribed by the *payee* thereof. The statute of 1854, as construed by this Court in *Holland vs. Chaffin & Lane*, (22d Ga. Rep., 343,) is decisive of this question. The Revised Code declares that a new promise, in order to renew a right of action *already barred*, or to constitute a point from which the limitation shall commence running on a right of action *not yet barred*, must be in writing, either in the party's *own handwriting*, or subscribed by him or some one authorized by him. A payment *entered* upon a written evidence of debt by *the debtor*, or any other *written* acknowledgment of the existing liability, is equivalent to a new promise to pay. Sections 2883, 2884. The Act of 20th February, 1854, expressly declares that it shall take effect from and after the date of its passage. We have no *dispensing* power to say that it shall not do so, on account of its not being *published*, under the law as it existed at the time of the passage of that act.

Let the judgment of the Court below be affirmed.

JOHN D. POPE, plaintiff in error, vs. WILLIAM SOLOMONS, E. H. WILLIAMS & Co., and WILLIAM E. WATKINS, defendants in error.

1. Where Williams borrowed of Solomons five hundred dollars, and promised to pay six per cent. per month for the use thereof for a part of the time, and five per cent. per month for the balance of the time, which was paid but not credited on the note, and afterwards sold out his entire property to a third party who obligated himself to pay Solomons the five hundred dollars,—on a bill filed by a creditor of Williams against Solomons and the third party who purchased Williams' entire property, alleging that Williams had left the State and was entirely insolvent, praying that the usurious interest paid by his insolvent debtor Williams to Solomons, might be credited on the five hundred dollar note, and that the purchaser of Williams' property might be restrained from paying the amount of the usurious interest over to Solomons, and be decreed to pay the same to the creditor's demand: *Held*, that the creditor was entitled to have an account taken of the amount of usury paid by Williams, the insolvent debtor, to Solomons, and to have that amount applied in payment of his debt.
2. Although a party may have a common-law remedy, yet, if it is not as complete and effectual as it would be in a court of equity, the latter Court having first taken jurisdiction of the cause, will retain it.

Motion to dissolve Injunction. Decided by Judge COLLIER. Chambers. Fulton County. September, 1867.

The allegations in Pope's bill were, that E. H. Williams & Co., (composed of Williams and Thomas H. Bomar,) rented from him a store-room at \$175 per month, and were in arrears with him \$500 with interest, for rent of September, October, November and December, 1866; that on 1st January, 1866, E. H. Williams borrowed of William Solomon \$500, agreeing to pay him five or ten per cent. a month as interest, payable monthly, that this interest was paid until a large amount had been received by Solomon, which ought to have been credited on the principal and lawful interest, which would have reduced the debt to the sum of \$262, but had been applied to discharge such usury; that in March, 1867, E. H. Williams had an interest in a stock of goods worth \$1,500 or \$2,000, that he then sold his interest therein to William E. Watkins, Watkins agreeing in writing to pay



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Solomon the entire amount for all the money borrowed from Solomon, with all the usury on the same, and charge the same as paid to Williams on account of said stock; Williams absconds, leaving no property in the State, and Bomar is insolvent. Discovery is sought from Bomar as to said indebtedness and his insolvency, from Watkins as to his purchase and how he was to pay for it, and from Solomon as to the amount loaned, at what rate, how much has been paid, &c.

The prayer is that Watkins be enjoined from paying Solomon till further order, and that any balance due from Watkins to Williams, after paying Solomon what is due him, (allowing him lawful interest only, and charging him with the usury received,) may be paid by Watkins to Pope.

The bill was sanctioned by Judge Warner, (then Judge of the Coweta circuit). Injunction was issued, and the bill was served on Solomon and Watkins.

Solomon answered that, according to his information, in February, 1866, said E. H. Williams & Co. went into said store as tenants of one Queen, and afterwards, and before 1st September, 1866, became by some arrangement Pope's tenants, and paid him all rent due to that date, and on that day, with notice to Pope, Bomar withdrew from the firm, (he says this discharged the firm,); that E. H. Williams did not owe Pope \$500 or any sum for rent from 1st September to 1st December, 1866; he loaned Williams \$500 on 24th May, 1866, at six per cent. per month, for thirty days, and took from Williams therefor his five promissory notes for \$100 each, with William Watkins as security; Williams did not pay the notes when due, but continued to use the money, and paid Solomon thirty dollars on the first of each month for five months; that they then changed the rate to five per cent. a month, and accordingly Williams paid Solomon twenty-five dollars a month for five months more, ending 24th February, 1867, which paid up to 24th March, 1867, and he never paid anything since.

Solomon and Watkins both answered that Williams owned an interest in the stock of goods and store-house on the corner of Whitehall and Peachtree streets, together estimated at

\$2,000, and on the 23d March, 1867, in writing, sold to Watkins all his said interest in consideration that he (Watkins) would pay off and discharge all the debts of said concern due for the stock, amounting to \$1,500, and "also for and in consideration of the sum of five hundred dollars which I (Williams) owe to William Solomon for borrowed money, and for which he, the said Watkins, is security," that Watkins was no party to the contract for usury, but was bound as security on said notes and was to pay them to Solomon without usury; they admit Bomar's insolvency, and that Williams absconds, and so far as they know, left no property in this State.

In September, 1866, a motion was made to dissolve the injunction and dismiss the bill for want of equity. To support his bill, Pope read in evidence his affidavit, to the effect that his said store-room was rented by him to said Williams and Bomar from March, 1866, to January, 1867, and that four months' rent, to-wit: \$500, with interest, was due to him by them.

The chancellor sustained the motion on the ground taken, and dismissed the bill. This decision is brought up for review.

BROWN & POPE, for complainant, plaintiff in error.

HILL & CANDLER, for defendants in error.

WARNER, C. J.

The error assigned to the judgment of the Court below in this case, is in dissolving the injunction and dismissing the complainant's bill for want of equity. The complainant is a creditor of E. H. Williams & Co., who are *insolvent*. Williams sold out his stock of goods to Watkins, the latter obligating himself to pay certain debts due by Williams on account of the stock of goods so purchased, including a note of five hundred dollars due to Solomon. The complainant alleges that the note to Solomon was given upon an usurious contract—that Williams has already paid *usurious interest*

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upon that note, which, if it had been credited thereon, would have reduced the same to the sum of two hundred and sixty-two dollars: that is to say, after deducting the amount of the *usurious* interest paid by Williams to Solomon, there is now due upon the note, only the sum of two hundred and sixty-two dollars which Watkins ought to pay Solomon under his obligation as the purchaser of Williams' stock of goods, instead of five hundred dollars; and that the complainant as the creditor of his insolvent debtor, is equitably entitled to have an account of the *usurious* interest paid by him to Solomon, and that the same be credited on the note; that Watkins be enjoined from paying to Solomon any more than what is *lawfully* due on the five hundred dollar note, after crediting the same with the amount of *usurious* interest paid by Williams to Solomon, and then to account with and pay over to complainant what may be remaining in his hands due to Williams for the stock of goods purchased from him—in payment of his demand against Williams. In other words, the complainant seeks to reach such an amount of the effects of Williams, his insolvent debtor, as may be remaining in the hands of Watkins, after the debt due by Williams to Solomon shall be purged of the usury; that Watkins ought not, either in law or equity, to pay more than two hundred and thirty-eight dollars out of the effects purchased by him from Williams, under his agreement to the Solomon note, and that as a creditor of Williams he is entitled to have the balance remaining in the hands of Watkins applied to the payment of his demand.

Such is substantially the case made by the complainant's bill. Lawful interest in this State for the use of money loaned, is seven *per cent. per annum*. Usury is the reserving and taking, or contracting to reserve and take, either directly or by indirection, a greater sum for the use of money than the lawful interest. The effect of usury is to *annul* and make *void* the contract for the *usury*—the lender having the right to recover the principal sum loaned, with legal interest. All titles to property made as a part of an *usurious* contract, or to evade the laws against usury, are *void*. Revised Code,

sections 2023, 2024, 2025. The contract by Williams to pay the *usury* to Solomon, was *void*, and he would have been entitled under the law to have recovered it back in a suit instituted therefor.

But it is said, no one but the party who pays the usury can take advantage of it—that it is a *personal* privilege not extended to strangers. As a general abstract proposition, it is true that a contract for usury cannot be avoided by a *mere stranger* to the transaction. But here the complainant is not a *mere stranger* having no interest in the result of this usurious transaction between Solomon and Williams, he is a creditor of Williams, claims under and through the latter to the extent of his debt; *his interest is affected by the usurious contract*, and to the extent of that interest he is entitled to be heard in relation to it; there is a *legal privity* between the complainant and his insolvent debtor; he is interested in his insolvent debtor's *estate*, so far as the payment of his debt is concerned, and is not, therefore, an officious interloper. *Dix vs. Van Wyck*, 2d Hill's N. Y. Rep., 522; *Post vs. Dart*, 8th Paige's Ch. Rep., 639.

1. Having an interest as a creditor in the property and effects of his absconding insolvent debtor, he is equitably entitled to the assistance of the Court to restrain Watkins from paying over to Solomon the full amount of the five hundred dollar note out of the effects of Williams in his hands, until the usurious transaction can be investigated, and to have his debt paid, if there shall be found sufficient funds for that purpose in the hands of Watkins, upon the final hearing of the cause.

2. It was also insisted that the complainant in this case had an adequate common-law remedy by garnishment. Although the complainant might have sued out a process of garnishment under the provisions of the Code, yet, upon the facts as stated in the record, we do not think his common-law remedy would have been as *complete* and *effectual*, as in a Court of equity; besides, the latter Court having *first* taken jurisdiction of the cause, will retain it. Revised Code, sections 3040, 3041.

Let the judgment of the Court below be reversed.

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Ralston vs. Thornton, Adm'r, and Bozeman and Wife.

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JAMES A. RALSTON, by his guardian *ad litem*, plaintiff in error, vs. BEVERLY THORNTON, administrator of James A. Ralston, deceased, and NATHAN BOZEMAN and WIFE, defendants in error.

In December, 1864, Ralston died intestate, leaving a widow and three minor children as his heirs-at-law. In March, 1865, one of the children died, and in April, 1866, another of the children died, leaving the widow and the other surviving child as their heirs-at-law. The property of Ralston the first decedent, remained in the possession of Thornton, his administrator. In February, 1867, the widow intermarried with Bozeman. On a bill being filed by Thornton, the administrator of Ralston, for direction: *Held*, that the widow was entitled to inherit one-half of the estate, as the heir-at-law of her deceased husband and children, notwithstanding her intermarriage with Bozeman before the property had been reduced to possession by her, and that the marital rights of the husband did not attach to any part of the property under the provisions of the Act of 1866.

Bill for direction, &c. Decided by Judge COLE. Bibb County. Chambers. September, 1867.

Thornton filed a bill for direction, &c., against Nathan Bozeman and his wife, and James A. Ralston, containing the following averments:

On the 12th of December, 1864, James A. Ralston, of Bibb County, Georgia, died, leaving a very large estate of realty, personalty and choses in action. He left, surviving him, his widow Aurelia L. and three minor sons, Henry G., David and James A. Ralston.

Thornton administered on his estate in January, 1865, and took the whole of it into possession.

Henry G. died on the 30th of March, 1865, aged but nineteen years, and David died in April, 1866, before he attained his majority. These deceased sons left no wives nor issue, and no debts, but neither of them has ever had an administrator.

In February, 1867, the widow was married to Dr. Nathan Bozeman. He, for his wife, demands one-half of said estate from said administrator, but the minor, James A. Ralston, claims that under the laws of distribution of Georgia, he is entitled to three-fourths of the estate, and has notified the administrator not to settle with Bozeman.

The magnitude of the estate, and the changes incident to the laws of Georgia in these revolutionary times, make it proper that the administrator should be directed by the Court how to distribute the same.

By the answers of Bozeman and wife and the guardian *ad litem* of said minor, many matters are set forth in no wise pertinent to the main and indeed the only question made by this record.

In anticipation of their marriage, Nathan Bozeman and Aurelia L. Ralston entered into a contract, to-wit: on the 7th of February, 1867, which, after reciting their respective residences, their contemplated nuptials, and that Aurelia L. "is seized and possessed, in her own right, of a considerable estate both real and personal, consisting of lands, money, stocks and other things, as one of the heirs and distributees of her late husband, James A. Ralston, deceased, and as heir and distributee of her two children, Henry G. Ralston and David Ralston, deceased," stipulated that, in consideration of said marriage, all of said estate should "remain and continue her separate estate, and not vest, by marriage, in her said intended husband, the said Nathan L. Bozeman, or be in any way subject to his alienation, or to the payment of his debts now owing or hereafter to be contracted by him; that all and singular the estate and property aforesaid, belonging to her, the said Aurelia L., or which she is entitled to, or may accrue to her as aforesaid, shall be subject to her disposition by will, and should she die without having a will, in that event one equal half of all the property aforesaid shall go to and vest absolutely in her said intended husband, the said Nathan Bozeman, if he is then living, and the other equal half of the same shall go to and vest absolutely in Mrs. Mary A. Lamar, the mother of the said Aurelia L.: "That said property shall be managed during the contemplated coverture, by the said Nathan Bozeman, and its rents, issues and profits shall be applied to the support and maintenance of her, the said Aurelia L., of him, the said Nathan Bozeman, and the child or children of the marriage, if any, and to the education of such child or children; and should

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the rents, issues and profits of said property amount at any time to more than what is sufficient for the purposes aforesaid, in that event the surplus shall be invested by him, the said Nathan Bozeman, according to his best discretion, and such investment shall be subject to all and singular the uses and limitations herein declared relative to the original property; and that the said Nathan shall, with the consent and approval of the said Aurelia L., have power and authority to sell any part of the estate or property herein before described, for the purpose of reinvestment, when he and the said Aurelia L. shall consider it for the best interests of the estate so to do; and in the event of the sale and investment of the same, the reinvestment, when made, shall be subject to all and singular the uses and limitations herein declared and set forth touching the original property."

The estate was all in the hands of the administrator undivided, and there were no debts against it. It was conceded that up to the time of the marriage of Aurelia L. and her son James A., they were equally interested in said estate of James A. Ralston and the two dead sons, but this minor claimed that her marriage gave him three-fourths instead of half.

By order passed in term time, the question was heard at Chambers, and then the Chancellor decided that the son, James A. Ralston, was entitled to only one-half of the estate, and that Bozeman, as trustee for his wife, should take the other half.

This ruling of the Chancellor is brought up for review.

B. HILL, for plaintiff in error.

COBB & JACKSON, and the NISBETS, for defendants in error.

WARNER, C. J.

This was a bill filed in the Court below by Thornton, the administrator of James Ralston, for direction, upon the following statement of facts. In December, 1864, James Ralston died intestate, leaving a widow and three minor children as his heirs-at-law. In March, 1865, one of the children died, and in April, 1866, another of the children died, leaving the widow and the other surviving child as their heirs-at-law. The property of James Ralston the first decedent remained in the hands of Thornton, his administrator. In February, 1867, the widow intermarried with Dr. Bozeman, before there had been any distribution of James Ralston's estate by the administrator thereof. The question made in the Court below upon the foregoing statement of facts, was as to what part or portion of the estate of James Ralston his widow was entitled to under the laws of this State, (she having intermarried with Bozeman before distribution thereof,) either as his heir-at-law or as the heir-at-law of her two deceased children. The Court below held and decided that the property of James Ralston, in the hands of his administrator, should be equally divided between Mrs. Bozeman and the surviving minor child—that each take one-half of the entire estate. This decision of the Court was excepted to, and is now assigned for error here.

The plaintiff in error mainly relies upon the provisions of the Act of 1845, which is substantially incorporated in the first Code, but omitted in the Revised Code. The 2453d section of the first Code declares, "Whenever any *feme covert*, having a child or children by a former marriage, is or becomes entitled to property by inheritance at any time, or devise, antecedent in date to her last marriage, and not in trust, *the possession of which is not obtained prior to such marriage*, such property shall not belong to the husband of such *feme covert*, but shall be equally divided between all the children of such *feme covert* living at the time when possession is obtained, and such *feme covert*. The portions of such *feme covert* and her children by her last husband, shall alone be subject to be reduced



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to possession by, and the title vest in, such husband." In *Mathews vs. Bridges*, 13th Ga. Rep., 325, this Court held that when a widow was entitled to a distributive share of an estate as a *feme sole*, but married before reducing the property to possession, her child by a former husband was entitled to a distributive share thereof, under the Act of 1845. *Roby vs. Boswell*, 23d Ga. Rep., 51. Had there been no change of the law of this State upon this subject *prior* to the marriage of the widow with Bozeman, the Act of 1845, and the construction of it by this Court, would have controlled the question in favor of the plaintiff in error. The Act of 1845 was directed against the *marital rights* of the husband of the second marriage. If the property had been reduced to possession, to which the widow was entitled, at the time of her marriage, then, as the law stood, it would have become the property of the husband. The object of that Act was to *cut off* the marital rights of the husband to the property of his wife, *which had not been reduced to possession*, to the prejudice of the wife's children by a former marriage, and such was the interpretation given to it by this Court.

But how stood the law in relation to the *marital rights* of the husband, at the time of the marriage of the widow with Bozeman in this case? By the Act of 13th December, 1866, his marital rights to the property of his wife, whether reduced to possession or not, were entirely taken away; he could not assert his marital rights over her property to the *prejudice* of her children by a former marriage. The Act of 1866 declares, "That from and after the passage of this Act, *all the property of the wife* at the time of her marriage, whether real, personal, or choses in action, *shall be and remain the separate property of the wife*, and that all property given to, inherited or acquired by the wife during coverture, shall vest in and belong to the wife, and shall not be liable for the payment of any debt, default or contract of the husband." The second section of the Act *repeals conflicting laws*. The manifest object and intent of this latter Act was to defeat and cut off the *marital rights* of the husband to his wife's property, whether real, personal or choses in action, not only such

as she had in *possession*, but such as she had *the right to reduce to possession*. The Act expressly declares that *all the property of the wife shall be and remain her separate property*. Now it is conceded that if the widow in this case had remained a *feme sole*, she would be entitled to inherit one-half of the estate, as the heir-at-law of her deceased husband and children. At the time of the passage of the Act of 1866, her right to this property was fixed and vested by *operation of law*; if she did not have the actual possession of it, her *legal right* to reduce it to possession was indisputable—her right to inherit this property as the heir-at-law of the deceased parties, did not depend upon the *contingency* of reducing it to possession, nor does the Act of 1866 restrict her right as to its enjoyment, upon *that contingency*—and this being so, her intermarriage with Bozeman in February, 1867, did not *defeat* any of her previously acquired rights thereto under the public law of the State.

The Act of 1866, in our judgment, *repeals* all prior laws which conflict with the declared object and intention of that Act in regard to the property of married women, as well that to which they were entitled at the time of the marriage, as that acquired by them afterwards during coverture, and to hold in this case that the right of the widow to this property as the heir-at-law of her deceased husband and children, depends upon its *reduction to possession* by her before or after marriage, would be in conflict with that Act.

Our conclusion and judgment, therefore, is, upon the facts of this case and the existing law applicable thereto at the time of the marriage, that, inasmuch as the widow was a *feme sole* at the time she inherited this property, her right and title to the inheritance thereof vested in her by operation of law; as such *feme sole*, she inherited the property of the deceased parties in her *own right*, and this being so, the Act of 18th December, 1866, secured to her *all* the property she had inherited from her deceased husband and children, as her *separate property* at the time of her intermarriage with Bozeman in 1867, whether she had reduced the same to possession or not; that the fact of her becoming a *feme covert* in 1867,

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 Oliver and Wootten vs. Coleman et al.
 

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did not *defeat* any of her rights to the property acquired by operation of law before she became a *feme covert*, and which was secured to her by the Act of 1866; that Act not requiring that the property should be reduced to possession, but expressly *repeals* all laws in conflict with it; that the Act of 1866 is *in conflict* with the 2453d section of the old Code, so far as the reduction of the property to possession is necessary to perfect her title thereto, or to affect in any way the *marital rights* of her husband, and providing for the children of a former marriage *against those marital rights*; that she is entitled to inherit one-half of the estate in as full and ample manner as if she had remained a *feme sole*, notwithstanding her marriage in 1867. It was her separate property before and at the time of her marriage, and is her separate property now, under the provisions of the Act of 1866.

Let the judgment of the Court below be affirmed.

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SHELTON OLIVER and RICHARD W. WOOTTEN, executors, &c., plaintiffs in error, vs. L. C. COLEMAN et al., defendants in error.

Under the Ordinance of the Convention, juries should be allowed a liberal discretion in adjusting the equities of the parties by their verdict; but it is the duty of the Courts to see to it that such discretion is not *abused* and made the instrument of *injustice*, by granting a new trial when the verdict is strongly and decidedly against the evidence, and the principles of equity as manifested thereby.

Motion for new trial. (Scaling Ordinance.) Decided by Judge WILLIAM M. BERGE. Lincoln Superior Court. October Term, 1867.

On the third day of December, 1862, L. C. Coleman, Anthony Harmon and E. J. Lyon made two single bills or bonds, payable to "Shelton Oliver and Richard W. Wootten, executors of Richard R. Wimpey, deceased, or bearer," one

for \$158, and the other for \$290, and due twelve months after date. The payees sued the makers thereon, and the defence was that the notes were within the Scaling Ordinance of 1865, and that plaintiffs ought not to recover more than the value of so much Confederate currency at the maturity of the notes.

At the trial, the plaintiff read in evidence the bonds and closed.

The evidence for defendants was as follows :

E. J. LYON, one of the defendants, sworn, said : the largest note was for cattle, the other was for a horse bought at the sale of the perishable property of the deceased by the executors (plaintiffs), at public outcry, on deceased's plantation in Lincoln County, Georgia, at the date of the notes. The terms of the sale were, cash for all sums under twenty dollars, for larger sums, notes with good security due twelve months after date, with interest from date if not punctually paid.

Nothing was said at the time about the currency in which the notes were to be paid. [The common currency of the country at that time was Confederate money. Contracts were then commonly understood to be in Confederate money when no other money was specified.]

The cattle and horses were bought for the prices then customary in Confederate money.

There were fifteen or twenty cattle. The prices were three or four times the prices of such property in specie before the war. Nothing passed with the executors about the sort of money in which the notes were payable. I gave the money to Mr. Sale to pay the notes for me.

PEYTON W. SALE testified : that Lyon gave him the amount of the notes in Confederate money to pay the plaintiffs, shortly before the notes were due ; he went to Oliver's to pay it in time, he thought it was a few days before the notes were due ; Oliver was not at home. Soon after the maturity of the notes, Sale saw Wootten and offered him the money, he declined it, saying they could not receive it because the legatees would not ; witness was at the sale and the

property sold for prices then usual in Confederate currency.

Z. S. WILLINGHAM testified : that at the close of the sale it was announced, that a discount of five per cent. would be allowed to purchasers who would pay in cash, but that "bee-hive money" would not be taken.

It was agreed by counsel that specie was three for one in Confederate money at the date of the sale, and twenty for one at the maturity of the notes, and at the trial was at a premium of forty per cent. in greenbacks.

That portion of the foregoing testimony of Lyon, in brackets, was objected to as illegal and irrelevant, and the objection was overruled.

The verdict was for \$40.76 and costs, for plaintiffs. They moved for a new trial upon the grounds that the Court erred in allowing said evidence of Lyon in brackets to go to the jury, and because the verdict was against law and decidedly and strongly against the weight of evidence.

The new trial was refused, and of this refusal complaint is made here.

A. T. AKERMAN, for plaintiffs in error.

TOOMBS & DuBOSE, for defendants in error.

WARNER, C. J.

The error assigned to the judgment of the Court below in this case, is in refusing to grant a new trial on the grounds specified in the motion therefor.

There was no error in admitting the testimony of Lyon as to "Confederate money being the common currency of the country at the date of the notes, and that contracts were commonly understood to be in Confederate money when no other money was specified." This evidence was admissible under the Ordinance of the Convention, for the purpose of showing the *intention* of the parties as to the *particular currency* in which the payment of the notes was to be made.

The notes were given for cattle and a horse purchased at an executors' sale. The evidence in the record is, that the

property sold for *three or four* times the price of such property in specie before the war. The principal of the two notes is \$448. If the property sold for four times its value in specie, for Confederate money, it was worth \$112 in specie to the purchaser—that is to say, the cattle and horse which were the *consideration* of the two notes, were worth at least \$112 at a specie valuation; that is *the value of the consideration* for which the notes were given, in *good money*. Why should not the defendants be required to pay the *intrinsic* value of the property in *good money* at the time of the sale, with the lawful interest on that amount from the time the notes therefor became due? Such a verdict would seem to have been according to the principles of equity between the parties in this case; but the jury found a verdict for the plaintiffs for only the sum of *forty dollars and seventy-six cents*. The defendants have got the plaintiffs' property, worth at least \$112 in specie at the time they purchased it, and now by the verdict they pay only \$40.76 for it. If such a verdict is in accordance with the principles of equity, we are unable to perceive it.

Whilst the Courts should allow the juries a *liberal discretion* under the provisions of the Ordinance, in adjusting the equities of the parties by their verdict, still it is their duty to see to it that such discretion is not *abused* and made the instrument of *injustice*. The "*principles of equity*" on which the verdict and judgment are required to be rendered in such cases, do not confer upon the jury an *unlimited arbitrary* discretion; but the verdict and judgment shall be rendered on principles of equity as *regulated by law*. The verdict in this case, upon the facts disclosed by the record, is not, in our judgment, in accordance with the principles of equity or the evidence in the case, but strongly and decidedly against both.

Let the judgment of the Court below be reversed, and a new trial granted.

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Penfold, Clay & Co. *vs.* Singleton & Co.

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PENFOLD, CLAY & Co., plaintiffs in error, *vs.* F. P. SINGLETON & Co., defendants in error.

Where a promissory note had been placed in the hands of an attorney at law for collection, and suit had been instituted thereon in the name of the plaintiffs, the rightful owners thereof, against the defendants, and pending the suit the plaintiff's attorney, on his own motion, moved the Court to strike out the names of the original plaintiffs and substitute in place thereof the name of a party who had no legal valid title to said note, and proceeded to take a verdict and sign judgment thereon in the name of such substituted party plaintiff against the defendants, which had been paid off by them: *Held*, that there was no error in the Court below in refusing to set aside and vacate the judgment on motion of the plaintiffs' attorney in said case for the benefit of his clients, who were the original plaintiffs in the case, against the consent of the defendants, who are entitled to be protected in the payment of that judgment, under the statement of facts presented by the record.

Motion to set aside a judgment. Decided by Judge CLARKE. Clay Superior Court. August Term, 1867.

Penfold, Clay & Co., by their attorney, S. S. Stafford, sued F. P. Singleton & Co., on a promissory note for \$538.33, dated 29th March, 1860, and due six months thereafter. The case was returned to June Term, 1861, of Clay Superior Court.

During the war, on motion of Stafford, who represented the case of Penfold, Clay & Co., as attorney in the Court, an order was taken reciting that plaintiffs were "alien enemies under the Act of Sequestration of the Confederate States of 1861," and "William C. Daniel, receiver under said act, having been appointed under said act, to prosecute such claims," it is ordered that Daniel be made a party plaintiff, and "that said claim proceed to judgment for the use of the Confederate States." Under this, verdict was taken and judgment entered in June, 1863.

The war having ended, Stafford, as the attorney for Penfold, Clay & Co., procured a rule *nisi*, reciting the foregoing facts, and calling on F. P. Singleton & Co. to show cause why said order and judgment should not be vacated and annulled, and said case proceed in the name of Penfold, Clay & Co. They showed for cause:

1st. There is no sufficient reason shown in said rule *nisi* why the case should be reopened. It appears by the records of the Court that a judgment has been rendered upon a verdict and duly entered and signed up by counsel for the same plaintiffs, and there is no evidence to show any default of defendants in any error committed, if error there was, in substituting a receiver of the Confederate States in lieu of the original plaintiffs. Said judgment was not the result of any accident or mistake or misapprehension of facts, there was no appeal or writ of error taken, and therefore the Court has no power to vacate this judgment.

2d. *Fi. fa.* was issued on said judgment and they had paid the same to the Sheriff, and were thereby discharged; that the Sheriff was the agent of the plaintiff in *fi. fa.* and authorized by law to receive payment, and if the fund was misapplied, they were not blameable.

3d. Because the order and judgment were valid.

There seems to have been no dispute about this payment, but it was conceded it was in Confederate States currency, and was never paid to the plaintiff.

The Court refused to set aside the judgment and discharged the motion, and this is brought up for review.

S. S. STAFFORD, SIMS & BOWER, by Judge LYON, for plaintiffs in error.

H. FIELDER, for defendants in error.

WARNER, C. J.

The error assigned to the judgment of the Court below in this case, is the overruling the motion to set aside the judgment against the defendants. It appears from the record, that a suit was pending in the Superior Court of Clay county, in favor of Penfold, Clay & Co., vs. F. P. Singleton & Co., upon a promissory note. The suit was brought by Stafford, as the attorney of Penfold, Clay & Co.

Pending the suit, it being represented that Penfold, Clay & Co. were alien enemies, on motion of Stafford, their attor-



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Penfold, Clay & Co. vs. Singleton & Co.

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ney, an order was passed by the Court making Wm. C. Daniel, receiver of the Confederate States, party plaintiff, and that said case proceed to judgment in his name, for the use of the Confederate States. There was a verdict and judgment thereon in favor of the substituted plaintiff against the defendants, which is signed by S. S. Stafford, plaintiff's attorney. The defendants paid off the judgment in Confederate money, without any objection being made to the currency, so far as the record shows. In August, 1867, Stafford, acting as the attorney of Penfold, Clay & Co., moved to set aside the judgment so rendered against the defendants in the case. This motion the defendants resisted, and the Court refused to grant it.

The defendants had nothing to do with making Daniel a party plaintiff, they were sued upon their contract and judgment obtained against them in a regular judicial proceeding. The judgment was regularly obtained against them, and they have paid it, and are entitled, so far as this record shows, to be protected in that payment by the judgment of the Court. Whether the original plaintiffs have received the money paid by the defendants in satisfaction of the judgment, does not affect them, they were not bound to see that the officers of the Court, to whom they paid the money, made a proper application of it in the absence of any fraud or collusion on their part. If Mr. Stafford, as the attorney of Penfold, Clay & Co., had been prevented from prosecuting the suit in their name, he could have dismissed it, or refused, as their attorney, to prosecute the suit in the name of other parties; but having *voluntarily* substituted the name of Daniel as plaintiff, and prosecuted the suit to judgment against the defendants in his name, and they having paid off the judgment, they will be protected by it in such payment, and the motion to vacate and set it aside, was in our judgment, properly refused by the Court below upon the state of facts presented by this record.

Let the judgment of the Court below be affirmed.

L. R. & S. D. WRAGG, plaintiffs in error, vs. B. M. STRICKLAND, defendant in error.

When a physician, without a diploma, has obtained a license to practice his profession from a member of the "Medical Board of Georgia" for each year, though more than one year, he is entitled to charge and collect his fees : Provided, the Medical Board has not *refused* to grant him a license in the meantime.

*Certiorari* from the County-Court. Decided by Judge UNDERWOOD. Floyd Superior Court. April Term, 1867.

Strickland sued plaintiffs in error in the County-Court of Floyd county in two separate actions, on two promissory notes signed by their said firm name, the one for \$40.30, made on the 24th May, 1862, with interest from January 1st, 1862, and the other for \$71.00, dated 1st of January, 1864, each due one day after its date, and payable to B. M. Strickland, or bearer.

The defence was that the consideration of said notes was medical services rendered by Strickland, that he had no diploma, and was not authorized to collect pay for such services.

Defendants examined said plaintiff as a witness.

He testified that the consideration of said notes was service rendered by him as a physician, and that he never had a diploma. He stated also that he had obtained temporary license from Dr. Moore, one of the Medical Board of Georgia, for the years 1859, '60, '61, '62, '63, which licenses had been lost ; that the service was rendered to defendant's families, and that the patients recovered.

The defendants then read the answers of said Moore to Interrogatories. This is the substance of them : He is a member of the Medical Board of Georgia, and was appointed when the Board was reorganized ; as such he licensed said Strickland for said years. The license for 1859, was as follows :

"GEORGIA, CLARKE COUNTY : Be it known to all whom this may be presented, that I, by virtue of the law creating the Medical Board of the State of Georgia, this day license

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Wragg vs. Strickland.

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B. M. Strickland to practice medicine in its various branches, in said State, until the first Monday in December next, being the day for the next regular Board Meeting of the Board. January 1st, 1859.

R. D. MOORE, M. D.,

*Member of the Medical Board, State of Ga.*

The licenses for the other years were in the same form. All temporary licenses are reported to the regular meeting of the Board, when the person presents himself for examination by the Board, but no record is kept by the member granting the temporary license.

Strickland never presented himself before the Board for examination, nor ever exhibited a diploma. He applied in person to Moore for said license in 1859, paid for it \$5.00, and the same sum for each of the others. Moore stated that he knew no reason why Strickland could not practice medicine and collect his charges for the same.

When the copies of said several temporary licenses, attached to Moore's answers, were offered in evidence, upon motion of defendant's attorneys, the Court rejected all of them except that for 1859.

Defendants then re-examined STRICKLAND, and showed by him that his account for 1862, about \$25.00 or \$30.00, was included in the first note, and the balance of it was for his account of 1861.

In the argument, the attorneys for the defendants insisted that, in the absence of proof of proper authority to practice medicine, plaintiff could not recover on these notes, or either of them; and that notwithstanding plaintiff had authority to practice in 1859, yet if the first note was given for that service and also embraced the account of 1861, when he had no license, the whole note was void, that the jury could not separate the good from the bad, and the consideration being illegal in part, the whole promise failed, and they requested the Court so to charge the jury.

The Court did so charge, with the addition that, if they believed, from the evidence, that the notes were given in good faith, and that the first note embraced \$25.00 or \$30.00 for

services rendered in 1859, when plaintiff was authorized to practice under a license, they would be justified in finding that amount for plaintiff.

The jury found for the plaintiff for the principal, interest and costs on each note. By consent of counsel the two cases were consolidated, and a *certiorari* sued out to set aside said verdicts.

Judge UNDERWOOD refused to set aside either verdict, and for this, his action is brought here for review.

ALEXANDER & WRIGHT, by W. AIKIN, for plaintiffs in error.

HARVEY & SCOTT, for defendant in error.

WARNER, C. J.

The error assigned to the judgment of the Court below in this case is, in refusing to sustain the *certiorari* and dismissing the same. The suit was instituted in the County-Court of Floyd county upon two promissory notes. The defence set up was that the notes were given for medical services to a physician who was not authorized to practice medicine, and charge for his services as such, under the laws of this State.

By the 11th Section of the Act of 1825, a single member of the Board of Physicians in this State, is authorized to grant a temporary license to applicants to practice medicine, and make report thereof to the next meeting of the Board—such temporary license to continue until the next meeting of the Board ; but in no case shall a temporary license be granted by one of the Board after the applicant has been refused license by the Board of Physicians. Cobb's Dig. 888.

The plaintiff, Dr. Strickland, obtained a temporary license to practice his profession from Dr. Moore, one of the Board of Physicians of the State, for the years 1859, '60, '61, '62 and '63, respectively. There is no evidence in the record that Dr. Strickland had ever been *refused a license* by the Board of Physicians. The construction which we give to this act is, that one member of the Board was authorized to

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Harvey vs. Daniel.

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grant a temporary license to the applicant for each year, though more than one year, reporting his action to the Board, as we presume he did, as it is made his duty to do so; provided, the Board of Physicians, had not, in the meantime, *refused* to license the applicant. Whenever the Board of Physicians, as such, refused a license to the applicant, then *no one member* of the Board could grant him one.

From the facts of this case, as the same appear in the record, we think the Doctor was entitled to charge for his services, and that the parties having had the benefit thereof, ought to pay for them, the more especially, as the record shows that his patients did not die, but had the good fortune to recover.

Let the judgment of the Court below be affirmed.

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THOMAS W. HARVEY, plaintiff in error, vs. WILLIAM A. DANIEL, defendant in error.

When a mere bond of indemnity is given against the payment of money due on the outstanding debts of a mercantile firm, the plaintiff must show some loss or damage sustained by the actual payment of the money due upon such debts, or that which the law considers equivalent to an actual payment thereof—in order to constitute a *breach* of the bond. The existence of a *mere legal liability* to pay such debts is not sufficient.

Debt. Nonsuit. Awarded by Judge WORRILL. Talbot Superior. Court. September Term, 1867.

This was debt by Harvey against Daniel, upon the following bond :

“STATE OF GEORGIA, *Talbot County*.

Know all men by these presents: that we, W. A. Daniel and Joseph Brown security, of said county, are held and firmly bound unto T. W. Harvey, of the same place, in the just and full sum of Seven Thousand Dollars, for the true payment of which we bind ourselves, our heirs, executors

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Harvey vs. Daniel.

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and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated this February 11th, 1859.

"The condition of the above obligation is such, that whereas the above bound William A. Daniel has purchased of the said T. W. Harvey his entire interest in a stock of goods in Talbotton, in said county, and whereas, according to the conditions of said purchase, said Daniel was to *indemnify* said T. W. Harvey against the payment of any of the debts of the late firm of Harvey & Brown; now if the said William A. Daniel shall well and truly pay, or cause to be paid, all of the debts of said late firm of Harvey and Brown, so as fully to *indemnify and secure said Harvey from all loss arising from said debts*, then this obligation to be null and void, else to remain in full force and effect.

W. A. DANIEL, [SEAL.]

J. H. BROWN, [SEAL.]"

The breach was alleged by averring that Daniel did not pay said debts so as to fully indemnify him, &c., but on the contrary thereof, at the time of making said writing obligatory, said firm was indebted by promissory note to one John F. Mathews, in the sum of \$1,800, dated and due on the 6th of October, 1858, and said Daniel, though knowing said note was held by Mathews and was unpaid, has not paid it so as to indemnify Harvey.

At the trial, plaintiff's attorneys read in evidence said bond and the promissory note signed by Harvey & Brown, aforesaid, which was credited with \$900 paid 23d December, 1858.

They then examined JOHN F. MATHEWS, who testified: that Harvey & Brown gave him said note for money loaned to the firm; that it was at the date of the debt, and still is, a valid debt against the firm, and affected only by said credit. Here the plaintiff closed. Defendant's attorneys moved a nonsuit, which was granted by the Court.

This ruling of the Court below is here assigned for error.

BLANFORD & MILLER, J. M. MATHEWS, for plaintiff in error.

W. A. LITTLE, B. HILL, for defendant in error.

WARNER, C. J.

At the trial of this case, the Court nonsuited the plaintiff, and that is the error assigned here to the judgment of the Court. This suit was brought upon an *indemnity* bond given by the defendant to indemnify the plaintiff against the outstanding debts of the firm of Harvey & Brown. The breach alleged is that the defendant has not paid a certain note made by the partners, to one Mathews. It is insisted for the plaintiff, that this bond is *more* than a bond for *indemnity*, that it contemplates the payment of the debts of the firm by the defendant, and the fact that he has not paid the debt of Mathews, is a *breach* of the condition thereof. The general rule of law applicable to this class of cases we understand to be, that in order to recover upon a *mere* bond of indemnity, *actual damage* must be shown. If the indemnity be against the payment of money, the plaintiff must prove *actual payment*, or that which the law considers equivalent to actual payment; a *mere legal liability* to pay the money is not sufficient. Chase vs. Hinman, 8th Wendell's Rep., 456; Franks vs. Hamilton, 29th Ga. Rep., 139.

Did the defendant bind himself to pay the outstanding debts of the firm of Harvey & Brown at or before any specified period of time. Has Harvey *paid* any of the debts of the firm? Has he sustained any *loss* or *damage* on account of the non-payment of the firm debts? The record does not show that he has, and he may *never pay* any of them, or sustain any loss or damage on account of the non-payment thereof. What was the *intention* of the parties to this contract? Was it their intention that Harvey should be *indemnified* against any *loss* or *damage* that he might sustain from having to *pay* the firm debts, or was it their intention that the condition of the bond should be broken, in the event Daniel did not pay the firm debts within a *reasonable* time?

Let the contract speak for itself, and be its own *interpreter*. The bond recites that "Whereas the above bound William Daniel has purchased of the said T. W. Harvey his entire interest in a stock of goods, and whereas, according to the conditions of said purchase, said Daniel was to indemnify said Harvey against the payment of any of the debts of the late firm Harvey & Brown." The obvious intention of the parties was that Harvey should be indemnified against loss or damage in case he should have to pay any of the outstanding debts of the firm, and until he can show that he has paid debts of the firm, or sustained some loss or damage arising from the non-payment thereof by Daniel, there is no breach of the indemnity bond; mere legal liability on his part to pay the firm debts, without more, does not constitute a breach of the bond. If, after the lapse of a reasonable time, Daniel had failed to pay the firm debts, and Harvey had in good faith paid off the same, we do say that under such a state of facts, an action upon the bond could not have been maintained. But here there has been no payment of any firm debt by the plaintiff, nor loss or damage shown to have been sustained by him in consequence of the non-payment thereof by the defendant. Let the judgment of the Court below be affirmed.

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ELIS P. CHISHOLM, Administrator of Wm. A. CHISHOLM,  
for the use of CHISHOLM & ADAIR, plaintiff in error, vs.  
DWIN A. TURNER, defendant in error.

was sold to Chisholm two negroes and warranted them sound; the purchase was made on account of Chisholm & Adair, who were partners. An action on the warranty was brought by Chisholm, who died during the suit, and his administrator was made party plaintiff. On trial, Adair, the partner of Chisholm, and an ussee in the action, was offered as a witness for the plaintiff, and the Court rejected him. It is said, that the Court erred.

Warranty. Tried before Judge COLLIER. DeKalb Superior Court. October Term, 1867.



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Chisholm, Adm'r, &c. vs. Turner.

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Turner sold to Wm. A. Chisholm, for Chisholm & Adair, certain negro slaves in December, 1859, and warranted them sound. Chisholm, for the use of himself and Adair, brought his action of covenant against Turner, claiming damages upon the ground that the negroes were at the time of the warranty, unsound and worthless.

On the trial the plaintiff read in evidence the letters of administration of Willis P. Chisholm, on the estate of said Wm. A. Chisholm, who had died *pendente lite*, a letter from defendant to Chisholm & Adair, dated 8th of March, 1860, in which he declined to refund the money and receive back the slaves, interrogatories of Drs. James F. Alexander and Willis F. Westmoreland as to the unsoundness of said slaves, and the answers to interrogatories by George W. Adair, one of the said plaintiffs as to the unsoundness of said slaves, and showing that Chisholm traded for them for the firm, &c., and closed.

The defendant's attorneys read the answers of Mary A. Edmondson and Mary E. Bond; to interrogatories as to the soundness of said slaves. They also examined as witnesses, Hinton, Weaver and Jabez B. Norton, to prove that said slaves were sound, &c.

While Norton was being cross-examined, he was asked by plaintiffs' attorneys if defendant did not buy other and younger negroes from Thomas J. Dean shortly after the sale to plaintiffs. The Court asked what that had to do with the case, saying he could not well see how it would elucidate the issue, and after explanation by the plaintiffs' attorneys, remarked in the hearing of the jury, "it was pretty far fetched, but as no objection was made, he would let it go for what it was worth."

The defendant was then offered as a witness in his own behalf. He was objected to upon the ground that Chisholm, one of the plaintiffs, was dead. The Court refused to allow him to testify. Defendant's attorneys, in arguing that point, reminded the Court, that Adair, the other plaintiff, had testified in the case. To this the Court replied it was because the testimony was not objected to, that he would then rule out Adair's testimony if defendant's attorneys wished him to do

. Then defendant's attorneys moved to rule out Adair's answers, and the Court granted the motion. The verdict was for the defendant.

A new trial was moved for upon the grounds that the Court erred in his said remark while Norton was being cross-examined, in ruling out the testimony of Adair, and because the verdict was against the evidence, &c.

The refusal of a new trial is made the ground of complaint to this Court.

HILL & CANDLER, for plaintiffs in error.

GLENN & SON, J. M. & W. L. CALHOUN, by the Reporter, for defendant in error.

WALKER, J.

Since the Act of 15th December, 1866, pamphlet p. 138, A. Code, Sec. 3798, no person is incompetent as a witness on account of crime, interest, or being a party; except where the party is one of the original parties to the contract or cause of action in issue, and on trial is dead, or insane; or where a representative is a party in any suit on a contract of his testator or estate, "the other party shall not be admitted to testify in his own favor." The interest of Adair was no ground for exclusion; his being a party did not exclude him; on what ground, then, was he excluded? Turner, "the other party," was not dead; why, then, was not Adair competent? I see nothing in the statute to exclude him, and the rejection of his testimony, therefore, was error, for which a new judgment must be granted.

Judgment reversed.

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Brown and Wife, *et al.* vs. Carroll, &c.

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F. B. BROWN AND WIFE, *et al.*, *caveators*, plaintiffs in error,  
vs. JESSE B. CARROLL, propounder of the will of MARY  
ANN E. SIMMONS, deceased, defendant in error.

A legatee propounding for probate a nuncupative will, which is *caveated* by the heirs at law, is a competent witness in favor of the validity of the will.

*Caveat* to proof of nuncupative will. Tried before Judge SPEER. Bibb Superior Court. May Term, 1867.

Carroll offered for proof in solemn form, as the last will of Mary Ann E. Simmons, the following paper :

"GEORGIA, WILKINSON COUNTY: We, the undersigned, witnesses, state, that we were present at the death of Mrs. Mary A. E. Simmons, in the county of Wilkinson, and State of Georgia, which took place on Sunday, the third day of January, 1864, at the house of Jesse B. Carroll, of said county, she being there on a visit at the time, (her residence being in the city of Macon) and on that day, and in our presence and hearing, she called the said Carroll to the bed where she was lying, and said to him, that she wanted him to have her house and lot in the city of Macon, and then and there called one Mary A. Spears, and in our presence and hearing, and told her to bear witness, that she wanted Jesse B. Carroll to have her said house and lot. This statement was made, as above stated, in her last illness, and under a full consciousness of her approaching death, and she died in about eight hours thereafter.

In witness whereof, we have hereunto set our hands, this the 19th day of January, 1864.

MARY A. E. SPEARS.

NANCY A. PITTMAN.

her

SARAH X WOODS."

mark.

It was caveated by Brown and his wife, and others, as next of kin, upon the grounds that it was not Mrs. Simmons' will, that it was procured by fraud and undue influence, and by a conspiracy between Carroll and said witnesses.

On the trial, Jesse B. Carroll was offered as a witness, and was objected to by *caveators*, because he was the propounder of the paper, and sole legatee under it, and also administrator of the estate of Mrs. Simmons. The objection was overruled.

CARROLL then testified that he, being Mrs. Simmons' attendant physician, she freely and voluntarily made said nuncupative will in his favor, and called upon witnesses to ratify her will, by which she left him her house and lot in Jackson, &c., detailing all other matters connected with said will.

The special jury set up the paper as the nuncupative will of Mrs. Simmons.

The error assigned is the admission of Carroll's testimony.

WHITTLE and DEGRAFFENRIED, for plaintiffs in error.

COBB & JACKSON, for defendant in error.

WALKER, J.

We have had several cases, during the present term, involving a construction of the "act to declare certain persons competent witnesses," acts of 1866, p. 138, Rev. Code, Sec. 3798. *Chisholm vs. Turner*, from DeKalb; *Field vs. Walker*, 1 *Murray*, and *Stamper & Wingo vs. Robinson*, from Smyth. This is the first case in which a will was connected with it. The statute, as we have repeatedly held, does not apply on account of interest, or being a party. Where one of the original parties to the contract or cause of action in issue and on trial, is dead, the other party cannot be admitted to testify in his own favor. In *Whatley vs. Slaten*, during the present term, we decided that the ordinance to adjust the equities between parties to contracts, &c., applies in terms to contracts, but does not embrace wills. Here it is not sought to set up a contract to which living and deceased persons were the parties, but the question is, what disposition did the deceased make of her property by will; did she make a will or not? This is a question which could not be decided until the death of the testatrix. The statute does not embrace the execution

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Brown and Wife, *et al.* vs. Carroll, &c.

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of wills; or perhaps it would be better to say that the death of the testatrix does not exclude parties from being witnesses in relation to the *factum* of the will, on the ground that the testatrix is dead. She is not what is meant by the other party to the contract, as specified in the *proviso* to the 1st section of the act.

In a *caveat* to a will, what is the cause of action in issue and on trial, and who are the parties to it? The cause of action is the *factum* of the will, and the parties are the propounders and the caveators. The parties to this proceeding are all in life. In no sense of the word can the testatrix be called the "other party," in opposition to either the propounder or the caveators; and it is only where one party to the original contract or cause of action is dead, that the other party is excluded. Here all the parties are in life, and both sides can be heard in behalf of their own interests. The facts of this case do not make this propounder one of those "hereinafter excepted."

Judgment affirmed.

AQUILA J. ORME, plaintiff in error, vs. R. M. MCPHERSON, principal, and CAMPBELL WALLACE, security, defendants in error.

A *ne exeat* issues only where the ordinary process of law is not available or sufficient against the debtor; and in every case, to entitle a party to the writ, he must show that no adequate remedy is afforded at law, and that the defendant is either removing or about to remove himself or his property, or the specific property in which complainant claims an interest.

An agent may verify the application for a *ne exeat*, provided he can, of his own knowledge, state the facts as positively and distinctly as is required of the complainant himself. The Court may, however, at his discretion, require the verification by the complainant in person before granting the writ.

Where Orme filed a bill against McPherson, praying a *ne exeat*, which bill was verified by Farrar, as agent for Orme, and who was not shown to have any knowledge of the facts charged in the bill, and who simply swore that what is contained in the bill, "as far as it concerns deponent's own act and deed, or comes within his own knowledge, is true of his own knowledge, and that which relates to the act or deed of any other person, he believes to be true:" *Held*, that this is not a sufficient verification to authorize the issuing of the writ; *Held, also*, that the affidavit must be positive, and not to the best of the knowledge and belief of deponent; *Held, also*, that the allegations in the bill may be looked to in connection with the affidavit, in determining whether charges are distinctly made and verified, so as to entitle the party to the writ—the allegations in the bill, if sworn to, become in effect a part of the affidavit.

*Ne exeat.* Motion to discharge bail. Decided by Judge LIER. Fulton Superior Court. October Term, 1867.

Orme averred that on the 5th October, 1865, he and McPherson entered into a written agreement, whereby McPherson agreed to buy, and he agreed to sell, city lot seventy-four Atlanta, and the tenements thereon, for \$4,700, Orme agreeing to make a fee simple title to the property, and McPherson agreeing to pay said price, on the 1st January, 1866; and on failure of either party to comply with his part of the contract at the time specified, the party failing was to pay the other \$2,000 as liquidated damages; that on the 1st January, 1866, he offered McPherson the deed, and he refused to receive it, and refused to pay the price or the

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Orme vs. McPherson and Wallace.

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\$2,000, and thereupon he sued McPherson in an action of assumpsit for said \$2,000, returnable to April Term, 1866, of said Court, and held him to bail; that McPherson gave bond in the sum of \$4,000, with B. M. Branner as security, as required by law; that since that Branner had moved out of Georgia and resided in Tennessee, and that McPherson had advertised his property for sale, was selling it at auction, and declared his intention to leave the State, and was then about to remove himself and his property out of the State; that he had no adequate legal remedy in the premises, and therefore prayed for the writ of *ne exeat regno*.

The bill was verified by Robert M. Farrar, agent for Orme, whose affidavit was, "that what is contained in the foregoing bill of Aquila J. Orme, so far as it concerns deponent's own act or deeds, or comes within his own knowledge, is true of his own knowledge, and that which relates to the act or deed of any other persons, deponent believes them to be true; deponent further says that he has not time and cannot obtain the sanction of the Superior Court of said county in time to remedy the mischief, and prays the writ of *ne exeat* may issue without the sanction of said Judge."

The clerk issued the writ, McPherson was arrested and gave bond in the usual form for \$4,000, with Wallace for security. The fact that Orme had sued him, claiming \$2,000 as liquidated damages as due 1st January, 1866, and required bail, was recited in this bond.

At October Term, 1866, the Chancellor ordered the *ne exeat* to continue until further order.

McPherson answered the bill, admitting in substance all its averments except as follows: he agreed with complainant's agent to purchase a house and lot in Atlanta, to obtain a comfortable home for his family; the agent knew that he wished it for that purpose, and represented that the property fully met that object, particularly that there was a well of good water and that the house was newly constructed; he went more than once with the agent to see the property, but the agent said the keys could not be found or had, and he was unable to examine the premises, particularly the house;

It had been shortly before painted, and externally appeared to be a new house. The price agreed on was \$4,700, and a paper was drawn up by the agent, which McPherson examined so far as to see that the house and lot were to be sold to him for the price agreed on; perhaps it was altered and signed and retained by the agent, but McPherson paid no attention to it except as to the object of his contract, a residence for his family. There was no negotiation or talk about penalty or liquidated damages or anything of the kind, nor did he have any intention or understanding of that kind. He was simply trying to buy a comfortable home. In point of fact, the water was unfit for use, the house was an old one furnished up for sale and leaked badly, and he refused to pay for it.

This answer was filed October, 1866. At the same time moved to dismiss the bill and discharge the bail on the *ne exeat* bond, because the affidavit was not made by plaintiff, because the affidavit was not sufficiently positive, and because sufficient ground for this writ was stated in the bill, and the bill was otherwise insufficient in law to obtain *ne exeat*.

This motion was not argued till October Term, 1867.

The Court dismissed the bill and discharged the bail, and this Orme complains.

BROWN & POPE, for plaintiff in error.

SNEED, HOGE, A. W. HAMMOND & SON, for defendants in error.

VALKER, J.

It may be very seriously doubted whether the complainant is entitled to any remedy in equity. Why was not his remedy by bail and attachment at law complete and adequate? *Manahan vs. Nichols*, 17 Ga. R., 78.

A *ne exeat* issues only where the ordinary process of law is not available or sufficient against the debtor; and in any case, to entitle a party to the writ, he must show that adequate remedy is afforded at law, and that the defend-



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ant is either removing or about to remove himself or his property, or the specific property in which complainant claims an interest. Rev. Code, sec. 3159-60. We are very much inclined to think that the complainant failed, even if his bill had been properly verified, to make out such a case as would entitle him to the process of *ne exeat*.

2. An agent may verify the application for a *ne exeat*, provided he can, of his own knowledge, state the facts as positively and distinctly as is required of the complainant himself. Rev. Code, sec. 2181. This does not deprive the Court of the power to require a verification of the application by the complainant in person. The Court has a discretion in the matter, and may require such verification as the case would seem to demand. In some cases the affidavit of an agent might be more satisfactory than of complainant himself; in others that of the complainant might be desirable; or if more complainants than one, the Court could require the verification by one or more, as in his discretion might be the most likely to establish satisfactorily the truth of the allegations in the bill. Rev. Code, sec. 6163.

3. The verification of this bill is fatally defective, and the Court did right to discharge the *ne exeat*. The charges in the bill may be looked to in determining whether the affidavit is positive or not. If the bill be sworn to, then the allegations become a part of the affidavit. The affidavit, however, must be positive as to the intention of the defendant to leave the State, or of the declarations of the defendant to that effect. Bryan vs. Ponder, 23 Ga. R., 483-4. The bill does not allege that the transactions took place with Farrar, the agent, and the affidavit simply states that *complainant's* bill, "so far as it concerns *deponent's* act, or comes within his own knowledge, is true," &c. Nothing is charged as coming within "*deponent's*" knowledge at all. There is really no verification of the bill whatever. We think the Court very properly discharged the *ne exeat*.

Judgment affirmed.

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Burts, Adm'r, vs. Duncan and Duncan.

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D. H. BURTS, Administrator of WADE H. GORDON, deceased, plaintiff in error, vs. J. R. and H. M. DUNCAN, Executors of JOHN S. DUNCAN, deceased, defendants in error.

Gordon died in Mississippi, in 1839, leaving a will by which he bequeathed certain negroes to his wife during widowhood, and appointed Turner his executor, who qualified in Mississippi, in January, 1840. On the 18th of May, 1845, the widow married Martin, and Martin took possession of the negroes and held them until the 9th of May, 1851, when he brought them clandestinely from Mississippi to Georgia, and sold them to Duncan for \$1600. In April, 1860, Burts was appointed in Georgia, administrator, with the will annexed, of Gordon, and on the 24th of April, 1860, demanded the negroes from Duncan, who refused to give them up, and suit was brought for them on the same day by Burts. *Held*, that inasmuch as Turner, the Mississippi executor, could not maintain an action in Georgia, to recover the negroes, that the statute of limitations did not begin to run against the estate of Gordon for five years from the time that Duncan took possession of the negroes, and that under the facts of the case, D. is not protected by the statute of limitations: *Held*, also, that the jury should not have found a general verdict for the defendant, even under Sec. 3023, Rev. Code, because the costs should be paid by defendant, notwithstanding the death or destruction of the property pending the litigation.

Trover. Motion for new trial. Decided by Judge WORRELL. Chattahoochee Superior Court. March Term, 1867.

Wade H. Gordon died in July, 1839, in Lowndes county, Mississippi, leaving a will by which a negro woman, Babe, and her child, Violet, were bequeathed to his wife, to be held for her during her natural life, or widowhood, for the purpose of aiding in raising their children till they were of lawful age, and in case she should die or marry, they were to be sold for the benefit of their children, and by which James H. Turner was appointed executor.

The widow afterwards, in May, 1845, married Samuel Martin, who took the negroes into possession, sold Violet in Mississippi, and in 1851, brought the others to Georgia, and sold them to John S. Duncan for \$1,600.

In 1860, Duncan, H. Burts became, in Georgia, administrator, *cum testamento annexo*, of said deceased, and sued John S. Duncan for said negroes and their hire. The declaration

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averred that said Turner, executor, (who had qualified in Mississippi) was, as such, possessed of said negroes in 1840, and afterwards, in said county of Mississippi, on the first day of October, 1845, casually lost said negroes out of his and said Georgia administrator's possession, and afterwards, in 1851, they came into the possession of defendant, who refused on demand, to give them up, &c., that they were worth so many dollars, and so many more for hire *per annum*, respectively. Pending the case, defendant died, and his executors became parties. On the trial, the following additional facts appeared:

SAMUEL MARTIN testified: that upon his said marriage, he took possession of said Babe and her children, kept them about six years, sold them to Duncan, deceased, in May, 1851, for \$1,650 in cash, spent the money for his own use, and had never paid any part of it to any of Gordon's children; that said Gordon's children were six, viz: Hilliard P., William E., John P., James N., Wade H. and Isaac S.; that he kept the negroes by consent of Turner till he brought them to Georgia, in 1851, and did not consult the children about bringing them away.

MRS. MARTIN testified the same in substance, stating that though the children all lived with Martin, the negroes were taken secretly, and without the children knowing it, that the youngest of her children was born in 1839, and that Martin had never settled with Turner, nor with any of her children, for the negroes sold by him, and Turner was insolvent.

HILLIARD GORDON testified: that Martin had not settled with the said children or executor, and that he (witness) sold his interest in said slaves to Nevil Dobbs, for \$80.

ISAAC S. GORDON testified: that he was a minor when this suit was commenced, and that he had sold his interest in said slaves to W. H. Montgomery.

JOHN HARVEY testified: that Martin, in 1851, sold the six negroes to Duncan, deceased, for \$1650, when they would have brought in market over, if the title had been undisputed, \$2,000, or \$2,500, that witness told Duncan, deceased, that

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he, witness, had fears about the titles, and he put their hire at from \$250, to \$300 *per annum*.

MATTHEW REVEL testified as to said sale, and that the negroes, if the title was undisputed, would have sold for \$2,500 or \$3,000, that Duncan, deceased, and Duncan's executors, kept them till slavery was abolished, and that they were worth for hire, *per annum*, \$400, and that in 1862, they were worth \$6,100.

The demand and refusal were admitted. The plaintiff offered the Georgia administrator to prove that his administration was at the instance of said Turner, in order to recover said slaves and their hire, but the Court rejected this evidence.

The defendants then read Martin's bill of sale, dated 9th May, 1851, conveying to Duncan, deceased, said woman and her five children, for \$1,600, and warranting the title; the interrogatories of said Wade H. Gordon, stating that his brothers, Hilliard, William and John, got part of said purchase money from Martin; John got \$200 in witness' presence from Martin, Hilliard and William sold their interests to Dobbs, whom Martin paid, and witness, in 1839, sold his to Montgomery, that two of the brothers were dead, that Martin maintained all of said children till they were of age, and that he, witness, was eight years old when his mother married Martin.

Defendants further showed by the records of Mississippi, that Turner qualified as such executor in January, 1840, and in October, 1845, procured an order from the Probate Court to sell said slaves.

The defendants examined several witnesses who testified substantially that Duncan, deceased, paid Martin the value of said slaves, and that their hire was balanced by the expense of keeping them, some of them being breeding women.

It was admitted that Duncan, deceased, kept them openly, and paid taxes on them as his own.

The Court charged the jury that if Turner, executor, did not sue for said slaves within four years after Duncan, deceased, bought them, and he was guilty of no fraud, and held them as his own, Turner, and all claiming under him, were barred

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by the statute of limitations, and that if Duncan, deceased, claimed title to said slaves in good faith, and they were emancipated by the government, plaintiff could not recover.

The jury found costs against the plaintiff. He moved for a new trial on the grounds that the Court erred in not allowing him to show that he administered at the instance of Turner, in charging as aforesaid, in refusing to charge, as requested, that if Duncan, deceased, was guilty of fraud, the statute of limitations would not protect him, and because the jury erred in finding that he should pay the costs.

The Court refused a new trial, and this is brought up for review.

RAMSEY, CRAWFORD & BURTS, for plaintiff in error.

RAIFORD & SAPP, for defendants in error.

WALKER, J.

By the Act of December, 1847, Cobb's Dig., p. 569, it is provided that nothing in the fifth section of the statute of limitations shall be so construed as to protect any defendant or defendants, from any action at any time, where the jury are satisfied that there has been a fraudulent removal or concealment of the property, in order to deprive the rightful owner of the possession or enjoyment of the same, any law, usage or custom to the contrary notwithstanding. This statute was in force at the time the possession of Duncan began, in 1851; and according to its provisions, Duncan could not be protected from "any action at any time" where there had been (no matter by whom) "a fraudulent removal or concealment of the property in order to deprive the rightful owner of the possession or enjoyment of the same." Do not the facts bring this case fully within the provisions of this statute? We think so.

By the 21st section of the Act of 1856, pamph., p. 235, it is provided that when the right to sue shall not accrue until after the death of any person, the time within which suit is to be brought, under the provisions of this act, shall not

begin to be computed until there is representation upon his estate: Provided, that in each of these cases (named in the section) there be representation by an executor or administrator duly qualified within five years from the death. Section 22 provides that where personal property shall be carried away or secreted, so that the party entitled to sue for the same, knows not who is in possession of it, or where it is, or against whom to bring his suit, the limitation of time in which suit, for the recovery of personal property are to be brought by the provisions of this act, shall not begin to be computed against such party until he has discovered where such property is, and who is in possession of it. *Ib.*

This act went into effect the first of June, 1856, *ib.* 237; and this action was brought 24th April, 1860, less than four years from the time the act went into operation. Now, by the act of 1847, Duncan was liable to suit "at any time," if there had been a fraudulent removal of the property in order to prevent the rightful owner from enjoying the same. In such a state of facts, the statute of limitations did not begin to run. It could not begin to run until the 1st June, 1856, and four years had not elapsed from that date until suit was commenced; and under the act of 1856, ought there not to be five years in which representation of the estate should be taken out before the statute should begin to run? Such would seem to be a reasonable interpretation of its provisions. Secs. 2877 and 2880, Rev. Code, is in substance both the acts of 1847 and 1856. See also Sec. 2646. So that taking all our statutes on the subject together, we think, under the facts of this case, the defendant was not protected by the statute of limitations; and the charge of the Court on that subject was erroneous.

The defendant in error insisted that the legal title was in Turner, the executor, and not in the Georgia administrator, and therefore, the plaintiff could not recover. Admitting the title to have been in Turner, we have shown that under the act of 1847, Duncan would not have been protected by the statute of limitations, because the property had been fraudulently removed. But Turner could not maintain an action in

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Georgia as executor, to recover these negroes. In *Davis vs. Smith*, 5th Ga. Rep., 295-6, this Court says: "An administrator or an executor derives his authority from his letters of administration or testamentary. As such, he has no power beyond the limits of the State by whose authority he is invested with the trust. He cannot sue, therefore, nor can he be sued in any other State. If it becomes necessary to sue in behalf of the estate which he represents, in a foreign State, he must obtain letters of administration in that State, according to the provisions of the law of that State." Citing quite a number of authorities. Again, in the *S. W. R. R. Co., vs. Paulk*, 24 Ga. Rep., 370, the Court says: "It is a general doctrine of the common-law, recognized both in England and America, that no suit can be maintained or brought by any executor or administrator, in his official capacity, in the courts of any other country except that from which he derives his authority. The authorities upon this point are exceedingly numerous and conclusive." Citing quite a number, and add, "See this point strongly stated by this Court, 5th Ga. Rep., 295, 296." This case was a construction of the act of 1850, Cobb's Dig., 341, and was adverse to a foreign administrator's right to sue in a case like this. The rule seems to have been changed and enlarged by the Rev. Code, Secs. 2573 and 2414.

We do not mean to decide that under the facts of this case the defendant is liable for the value of these negroes. We recognize the rule as laid down in the Code, Sec. 3023, that "The death or destruction, or material injury to the property pending the litigation, shall be no defence to a mere wrong doer. If the defendant is a *bona fide* claimant, and the injury arises from the act of God, and in no wise the result of defendant's conduct, the jury may take the same into consideration, but in no case shall such a Court cast the costs upon the plaintiff." In this case, the jury "cast the costs upon the plaintiff." Under the facts of the case, we hold that the defendant was not protected by the statute of limitations; and no other defence is shown sufficient to defeat the legal title shown in the plaintiff. If the property had been destroyed

by the act of God, the *vis major* pending the litigation, and the defendant is a *bona fide* claimant, as he seems to be, the jury may take the same into consideration, but they cannot, on this account, make the plaintiff pay the costs. I am inclined to think that a verdict finding the costs in favor of the plaintiff would have been sustained. This question is not before us now however.

Judgment reversed.

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MILES GREEN, plaintiff in error, vs. JAMES COLLINS, defendant in error.

A party, at the request of the maker of a promissory note, took it up from the payee, and the purchaser claimed a balance to be due thereon; and in consideration that the holder would not attach the property of the maker, and would permit him to move out of the State, a third party signed the note as surety. Suit was brought on the note against this surety, and the Court below decided that the note sued on did not contain such a promise in writing as would be binding under the statute of frauds, and non-suited the plaintiff: *Held*, that this was error.

Complaint on note. Non-suit awarded by Judge WORRILL. Marion Superior Court. April Term, 1867.

This action was founded upon a promissory note as follows:

"On the first day of January, 1863, I promise to pay G. DeLawney or bearer, Twelve Hundred and Ninety-three Dollars and Seventy-five Cents, with interest from January 1st, 1859, value received, to be discharged in middling cotton at ten and a half cents per pound, to be delivered at Florence, Stewart County, Georgia, in square bales, by the first of January, 1863.

L. B. COLLINS,

*his*

JAMES O COLLINS.

*mark.*

December 8th, 1858.

Endorsed—"Received on this note \$963.75, January 1st, 1859."



It was proceeding against James Collins on appeal. He plead the statute of frauds, &c.

The plaintiff, after the note was read in evidence, testified: that in the fall of 1858, he bought from L. B. Collins a settlement of lands which L. B. Collins had bought from DeLawney; they supposed that there were five hundred and thirty acres, and the price agreed on was \$11 per acre. L. B. Collins requested plaintiff to take up said note from DeLawney, and agreed that if the land, when measured, fell short of that number of acres, he would refund to plaintiff the price per acre for each acre short, and plaintiff agreed that if it contained more, he would pay L. B. Collins the price per acre for each surplus acre. It fell short thirty acres. When L. B. Collins was about to remove from the State, plaintiff demanded of him payment or security for said deficiency, and threatened to attach his property. To prevent this, James Collins, who was present, signed the note.

For the defendant, DELAWNEY testified: that he never owned a note on L. B. Collins and James Collins, but had owned a note on J. B. Collins, in substance the same as the above, except that it was signed by L. B. Collins only—it being given by L. B. Collins in consideration of lands on Hannahachee Creek in said Stewart County, sold to him by witness; L. B. Collins sold the land to plaintiff, plaintiff's note was given to DeLawney in lieu of L. B. Collins', and the deed was made to Green, and Collins' said note given to plaintiff.

The defendant stated the same as the plaintiff had stated, as to why he signed the note.

The Court decided that this signing of said note was not such a promise in writing to pay the debt of another as was binding on the defendant, and the plaintiff allowed a non-suit.

He now says that decision was wrong.

E. G. RAIFORD, for plaintiff in error.

M. H. BLANDFORD, for defendant in error.

WALKER, J.

The error into which the Court below fell, was in construing the contract between L. B. Collins and the plaintiff as a satisfaction of the DeLawney note. Such was not the effect of that contract. Green was to take it up, to purchase it, in other words, which he did, and it became his. L. B. Collins let him have the land, and the value of this was credited on the note, as per contract, leaving still due to the plaintiff on the note three hundred and thirty dollars and interest. In this state of facts, L. B. Collins proposed to move out of the State, to which plaintiff objected, and threatened to attach his property unless this balance were paid or secured. In consideration that the plaintiff would not attach and would permit L. B. Collins to move out of the State, James Collins, the defendant, signed the note sued on; or, as defendant himself expresses it, "Bryant Collins was about to move away, and Green threatened to attach his property, claiming that Bryant Collins owed him three hundred and thirty dollars for some deficiency in the quantity of land, &c., therefore he put his name to the note sued on, in consideration that Green would not attach the property of Bryant Collins." Green then had a subsisting debt against L. B. (Bryant) Collins, and in order to enable Bryant to move out of the State, defendant signed the note sued on. Why was not this a valuable consideration, amply sufficient in law to uphold the defendant's promise to pay the amount due on the note, about which in equity there seems to be no dispute. The amount claimed, so far as appears, was certainly owing to the plaintiff; and the defendant, for a valuable consideration, signed the note obligating himself to pay it. Ought he not to comply with his promise? If, upon the trial, it should appear that Bryant Collins did not in fact owe the amount claimed, then of course the defendant might plead that as a defence; but it certainly would be doing the plaintiff injustice to hold the defendant not bound, when, in consideration of his promise, the plaintiff has lost the means of enforcing his claim against his original debtor, L. B. Collins. The Court should

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not have awarded a non-suit, but should have sent the case to the jury.

Judgment reversed.

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PLEASANT J. MULLINS, plaintiff in error, *vs.* WM. H. CHRISTOPHER, *prochien ami* of PAULINE CHRISTOPHER, defendant in error.

1. If a court of equity grant a new trial after a judgment rendered at law, it should be done only on a proper case being made. This is a power which should be exercised with great caution. No degree of wrong or injustice in the determination of a case at law will entitle the injured party to resort to equity, after judgment at law, unless there be some special ground for such interposition. If a party by proper diligence could have protected himself at law, but by negligence failed to do so, he cannot go into equity to be relieved from the consequences of such negligence.
2. The ordinance of the Convention of November, 1865, "to adjust the equities between parties," applies to contracts and not to judgments.
3. All judgments rendered prior to 8th November, 1865, were ratified and affirmed by the Convention, (Article V. Sec. 1, Par. 7) subject only to reversal by motion for new trial, appeal, bill of review, or other proceedings in conformity with the law of force when they were rendered.
4. After a verdict has been received and recorded, and the jury dispersed, it cannot be amended in matter of substance, either by what the jurors say they intended to find, or otherwise.

Bill to enjoin Judgment, &c. Decided by Judge WORRILL.  
Taylor County. Chambers, May, 1867.

Mullins averred that Wm. H. Christopher, as *prochien ami* of his daughter, Pauline, brought an action against him for breach of a promise to marry Pauline; that the case was tried on appeal at April term, 1865, of said Court, and the verdict was against Mullins for \$5000 and costs; that *fi. fa.* had been issued for that sum and was in the hands of the Sheriff for collection.

It was averred also, that this verdict was found upon the

testimony of Wm. H. Christopher, plaintiff, solely, who testified that in 1862, when the action was brought, defendant was worth \$75,000, counting the value of his slaves, which were from fifty to seventy-five in number. Whereas, in fact, defendant in that year paid taxes on 3086 acres of land, valued at \$15,000, twenty-eight slaves, valued \$11,200, making a total of but \$31,200; that this, too, was given in on the basis of Confederate currency, which was the only currency of this State then, and when said verdict was rendered; that at the date of the verdict one dollar in specie was worth fifty dollars of such currency.

Because, as he averred, the jury expected said judgment could be paid in such currency, because defendant had lost heavily by the results of the war, and because Pauline's injury was only imaginary, (she having since married a man more suitable for her) Mullins thought that said judgment should be reduced to its specie value, and prayed injunction against its enforcement.

At Chambers the following facts appeared by *ex parte* affidavits.

Three of the jury affirmed that they intended their verdict could be paid in Confederate currency, and believed the balance of the jury so intended. One of the complainant's solicitors affirmed that he had heard six of the jury say that they intended.

Christopher affirmed that at the time of the breach of promise Mullins was sixty years old, and Pauline but sixteen, that her parents had reluctantly consented to the nuptials, had prepared her wedding apparel, &c., Mullins, about appointed time, and with no notice to them or Pauline, without excuse, married another.

Christopher's solicitor affirmed that he was plaintiff's attorney in said action, (related the testimony in said cause substantially as aforesaid) that the case was defended by Col. S. Bailey and Edwards & Holsey, able lawyers, who urged every effort to find nominal damages only, because the same would not be paid on a specie basis.

Two of the jurors who swore as to their intention, &c., af-

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firmed that, as they recollected, nothing was said by the jury as to the kind of currency in which their verdict was to be paid. Defendant read also an affidavit made by Mullins, showing that he, in January, 1866, was worth \$15,000 at least.

The Chancellor refused the injunction, and this is assigned as error.

MILLER, EDWARDS & HOLSEY, for plaintiff in error.

W. S. WALLACE, B. HILL, for defendant in error.

WALKER, J.

1. This bill is filed with a double aspect; either for a new trial, or to reform the verdict. That a court of equity has the power to grant a new trial in a case tried at law upon a proper case made, has been settled since the celebrated contest between Lord Ellesmere and Lord Coke, in the early part of the seventeenth century. It is a power which should, however, be exercised with extreme caution, and on a proper case made. *Pierce vs. Christain*, 3 Ga. Rep., 229. In delivering the opinion in this case, Judge Lumpkin says: "The general rule is, that courts of chancery will not interfere after verdict and judgment at law, except in cases of fraud, or surprise, or in extraordinary cases where manifest injustice would be done, nor where the party might have defended himself fully at law, and neglected to do it. Great abuse would be made of a contrary doctrine, by drawing within the jurisdiction of equity, as by a side wind, almost all causes decided at law. The high powers entrusted to chancery to promote the purposes of justice, should not be abused to the vexation of the citizens and the unsettling solemn decisions of other courts, where it is to be always presumed that full justice has been done." See also *Robbins vs. Mount*, 3 Ga. Rep., 78; *Scudder vs. Puckett*, 12 Ga. Rep., 338; *Stroup vs. Black*, 2 Kelly Rep., 279; *Kenan vs. Miller*, ib., 329; *Bostwick vs. Perkins*, 1 Kelly's Rep., 139; *Taylor vs. Sutton*, 15 Ga. Rep., 106. But no degree of wrong or injustice in the determination of a case at law, will entitle a party to resort to equity, unless there is some special

round for its interposition. *Pollock vs. Gilbert*, 16 Ga. Rep., 402. If a party have a good defence at law, and from negligence fail to set it up at the proper time, he must take the consequences of his own *laches*; he cannot go into equity to be relieved from the consequences of such negligence. See the cases already cited.

We listened with much pleasure to the argument of our learned brother (who is so well known as the author of the *Bench and Bar of Georgia*," and numerous other productions,) in favor of the aged plaintiff in error. We are satisfied his follies have been cured ere this, and if the principles of equity would sanction it, we should take pleasure in relieving him from some of the consequences arising from his folly. But after patiently considering the authorities and arguments of our learned brother, as applied to the facts of this case, we are satisfied there is no relief for his aged client.

He has had his day in court, and there must be an end to litigation. We see no ground on which equity can seize to set aside the verdict and grant a new trial.

It was insisted that the verdict was intended by the jury to be payable in the equivalent of "Confederate money," and in present currency; and therefore, the verdict and judgment should be so reformed or amended as to express that intention; and that the equities between the parties should be adjusted under the ordinance of November, 1865. This ordinance applies in terms to "contracts not yet executed" and by no fair rule of interpretation can it be made to apply to a judgment. See *Whatley vs. Staton*, decided during the present term.

Besides, the same Convention which passed the ordinance adjusting the equities between the parties to contracts not yet executed, also made a constitution by which it is provided, V. Sec. 1, that "All judgments, decrees, orders, and proceedings of the several courts of this State, heretofore made within the limits of their several jurisdictions, are hereby ratified and affirmed, subject only to past or future reversal by motion for a new trial, appeal, bill of review, or

other proceeding, in conformity with the law of force when they were made." So that while the convention provided for adjusting the equities between parties to contracts not executed, it also, at the same time, ratified and affirmed all judgments made by the courts within their respective jurisdictions. This would seem to be pretty conclusive evidence that the ordinance was not intended to embrace judgments.

4. This Court has repeatedly decided that a juror, after the rendition of his verdict, cannot be heard to impeach it; and in accordance with these decisions, the Rev. Code, Sec. 3442, says: "A verdict may be amended in mere matter of form, after the jury have dispersed; but after it has been received and recorded, and the jury dispersed, it cannot be amended in matter of substance, either by what the jurors say they intended to find, or otherwise." This would seem to be conclusive. To allow a verdict to be amended by what some of the jurors, two years after the rendition of the verdict say they intended to find, would be directly in the teeth of the statute. Especially would this be wrong in this case, for two out of the three jurors sworn, state on oath, that so far as they recollect, there was nothing said at the time the verdict was rendered, among the jury in their consultation, as to what character of currency the verdict should be paid in. The language of the statute is clear and unambiguous. It is imperative and must be obeyed. It prohibits the amendment of this verdict by what the jurors say they intended to find. We see no ground upon which the plaintiff in error can be relieved; and must, therefore, affirm the judgment of the Court below.

Judgment affirmed.

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Louis & Co., *et al.* vs. Bamberger, Bloom & Co., *et al.*

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LOUIS & Co., *et al.*, plaintiffs in error, vs. BAMBERGER, BLOOM & Co., *et al.*, defendants in error.

though it is a general rule that on the coming in of the answer plainly and distinctly denying all the facts and circumstances upon which the equity of the bill is based, the Court will dissolve the injunction, yet in some particular cases, the Court will continue the injunction, though the defendant has fully answered the equity set up. The granting and continuing of the process must always rest in the sound discretion of the Court, to be governed by the nature of the case; and this Court will not control the exercise of that discretion, except in a case where the discretion has been abused.

Injunction and Appointment of Receiver. By Judge ARKE. Chambers. Randolph County. February, 1867.

The case made by the bill is as follows :

Joseph Schoenfeldt individually owed Bamberger, Bloom & Co., \$5,227.41, for goods sold from 16th November, 1865, to 16th April, 1866, Bamberger, Staadhecker & Co., \$919.53, for goods sold from 9th February, to 16th March, 1866, Schuch & Flexner, \$1,217.25 and interest, and Starr & Helms, \$706.70 for goods. These creditors all live in Louisville, Kentucky, and at Schoenfeldt's instance, had shipped these goods to Albany and Cuthbert, Georgia.

At the time of these purchases, and at the filing of this bill, Schoenfeldt was combining and confederating with A. Daniel Baer, of Randolph county, Georgia, to defraud said creditors, and they, as partners, received said goods at Albany and Cuthbert, and with other goods, which Schoenfeldt had hidden from these creditors, exposed them for sale at said two places, Schoenfeldt selling at Albany, and Baer at Cuthbert. In pursuance of this fraudulent combination, on the 23d of December, 1866, they combined with Adolph Louis & Co., of Milledgeville, Tennessee, and on that day, gave A. Louis & Co. promissory notes, signed by themselves individually, for \$16,433.61, \$3.95, and for \$612.17, each due one day after date, (the first one endorsed "Stricker & Brothers") and gave them a pledge on both stocks of goods, and transferred to them the books of account and evidences of debt of the Cuthbert



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house, all as collateral security to secure said notes. These notes and mortgage and transfer are believed to be fictitious and fraudulent. They kept the goods, were selling them off below market prices, and converting the money, and the Albany stock had been clandestinely removed and mixed with the Cuthbert stock.

Schoenfeldt residing out of the State, and Baer thus converting the goods, these creditors sued out attachments against Schoenfeldt, returnable to February term of the County-Court of Randolph county, and on the 24th December, 1866, had the goods levied on by the sheriff, and then filed this bill for appointing a receiver, &c. After that, A. Louis & Co., by their agent, one Kuperman, foreclosed said mortgage, and procured the deputy sheriff to levy their mortgage *fi. fa.* on the same goods.

The goods are liable to injury by keeping, and would sell far below their value at sheriff's sale.

They therefore prayed injunction as to the sale under the mortgage *fi. fa.*, and that a receiver be appointed who shall sell the goods at retail, that the several defendants discover the truth touching these matters, and the fraudulent notes and mortgage and transfer be cancelled, &c., &c.

The Chancellor granted a rule *nisi* to show cause why the receiver should not be appointed, and why the injunction should not be granted.

Upon this hearing, the defendants read an affidavit of Wm. E. Smith, substantially stating that, on October 23d, 1866, Wm. Kuperman, of the firm of A. Louis & Co., Schoenfeldt, Baer and ———, agent of Stricker & Co., called on him to draft said mortgage; Stricker & Co.'s agent gave up the note for \$1,803.95, held by his firm, and took in lieu of it Schoenfeldt & Baer's note for the same amount, of that date; this note was embraced in the mortgage; there was no dispute as to the amount due, the only hesitation was because Schoenfeldt feared the business might be stopped by foreclosure; to avoid that, it was stipulated in the mortgage, that, so long as the mortgage was not foreclosed, mortgagors should conduct the business as if no mortgage existed, paying the cash

received to A. Louis & Co., and transferring to them the accounts, if any goods should be sold on credit, A. Louis & Co. agreeing not to move in the matter unless other creditors did so; that A. Louis & Co. had kept this pledge; he saw the mortgage executed and delivered.

They also read an affidavit of Baer, affirming that the notes and mortgage were not fictitious, but that Schoenfeldt really owe A. Louis & Co. the two notes for \$16,433.61 and \$612.17, for goods purchased of them; that it was an honest effort to secure A. Louis & Co., (but without defrauding the other creditors) so that they might carry on their business, believing that if they were allowed to do so, they could pay all of the firm debts; the other note expressed the true amount due Stricker & Co., and the mortgage was *bona fide* made to secure it also, and that "but for the conduct of J. Schoenfeldt," he believed the business might have been carried on, and all the debts paid.

Schoenfeldt had previously answered the bill, and his answer was also read. It admitted that he was a citizen of Indiana, in business for some time past in Georgia, that he had actually purchased from the several complainants goods, and owed them therefor the amounts charged, and that the goods were shipped as charged.

He denied any combination with Baer for fraud, averring that his credit was then good, and he thought he could pay his debts; that the goods were shipped to Albany, and when the Cuthbert store was opened, he intended that the business should be in his name, but that Baer proposed to conduct the business in his name because he was known, and Schoenfeldt was unknown in Cuthbert; complainants did not know Baer in said transactions, but without their knowledge, without his putting any money into the concern, Baer was constituted co-partner, though he continued to buy goods on individual credit, not then believing (but now believing) Baer intended to defraud the creditors; the mortgage to a certain extent, covers a fictitious amount; they did not owe A. Louis & Co., anything like the amount expressed in the mortgage; it was so given upon the representation of A. Louis &

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Co.'s agent, that it was necessary to keep off other creditors; the amount due A. Louis & Co. by him, and him and Baer, was unsettled, but it did not exceed \$11,000, (he thought it was less) a considerable part of which has since been paid; he would not have signed the mortgage, but for Baer's representing that there were assets sufficient to pay the debts; all the goods had been moved to Cuthbert, and many sold; (at what prices he did not know) Baer made false invoices of those shipped from Albany; he thought it proper that a receiver be appointed.

The chancellor appointed a receiver and granted the injunction. Subsequently other answers were filed.

Schoenfeldt filed a second answer, differing from the first in these particulars: He said satisfactory arrangements had been made with complainants, or most of them, by which he believed said claims would be settled and discharged; after the formation of the partnership, goods were generally charged to the firm, sometimes to Schoenfeldt & Baer, or J. Schoenfeldt & Co., and at other times, and by other creditors, to A. S. Baer & Co., those he bought from complainants were upon his individual credit, and sent to Albany, and part of them had gone to Cuthbert; he and Baer owed A. Louis & Co. \$15,270.07, besides interest, for goods, and upon accounting with Kuperman, fixed the amount at \$16,433.61; this excess was by a mistake, produced by the absence of bills, &c., and had been since corrected by a credit, and they really owed the Stricker & Co. note, and put it into the mortgage; they also put in a note for \$612.17, due A. Louis & Co., and that all this was done in good faith to secure those *bona fide* debts; since that time Baer paid A. Louis & Co. \$5,592.43, which had been credited and the mortgage *fi. fa.* was for \$12,994.46, the true balance then due, but since the *fi. fa.* issued, he and Baer, had paid A. Louis & Co., \$1,631.12. He stated that what he meant in his former answer, and what he intended to answer, was, that Schoenfeldt & Baer owed the Nashville house about \$1,100, the balance of the debt due A. Louis & Co., was to the Cincinnati House, and he intended to have included the note for \$612.17, as due A. Louis & Co., and to have included the Stricker & Bro. note.

He said that the mortgage was fairly made for a real debt, and without fraud, that he was embarrassed, but hoped to arrange his debts, and that Baer was similarly situated.

Wm. Kuperman, one of the firm of A. Louis & Co., also answered the bill. He denied all combination, stated that the mortgage was for a *bona fide* debt, and substantially gave the same figures last given by Schoenfeldt as the basis of the settlement, states how the mistake occurred, by not having the bills of the Cincinnati house. He set up that a good bill for \$2,825 on Mrs. Pace, of Dougherty county, was due complainant to Schoenfeldt as a credit, which had not been allowed, that there were about \$30,000 worth of goods in the stores, bought of various parties, and he did not believe over \$500 or \$600 worth of the original goods bought from complainants were on hand in Cuthbert. He thought a public sale, was proper, and the appointment of a receiver improper.

Baer's answer, also of file, is in substance, the same as Kuperman's, with a positive denial of any fraud in removing the bills, in making the mortgage, &c., &c. He removed them to a better market, sold them at a reasonable profit, for cost, applied them to A. Louis & Co.'s claim, and but for Schoenfeldt's conduct, bringing down upon them the attachments, he believed they could and would have paid all their debts. He favored an early sale by the sheriff.

These answers having come in, a motion was made by complainants to dissolve the injunction, and to set aside the appointment of a receiver.

At this hearing, the pleadings and affidavits already mentioned, were read, as was also an affidavit from Arthur L. Esq., (for complainants) in substance, as follows: He read Schoenfeldt's first answer, that portion of the indebtedness of Schoenfeldt & Baer to A. Louis & Co., was fully and fairly discussed between Schoenfeldt and himself; Schoenfeldt stated that he did not think it exceeded \$9,000, including debts of both the Nashville and Cincinnati houses, but he put it at \$1,100, saying that would not only cover the debt to both said houses, but his individual debt to

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the Cincinnati house, created before he and Baer were partners ; he was very frank and free in his statements, and did not hesitate to state that the mortgage covered a fictitious amount, and was made to cover up the assets of the firm, so that they might continue business without interruption by other creditors.

After argument had, the chancellor refused to set aside the order appointing the receiver, or to dissolve the injunction. Upon each of these motions a bill of exceptions was made out and certified, and they come to this Court consolidated.

The plaintiffs in error contend that the bill contained no equitable foundation for injunction or the appointment of a receiver ; or if they did, that in each instance the affidavits and answers swore off that equity, and therefore that the chancellor erred in holding the contrary, &c.

STROZIER & SMITH, DOUGLASS & PLATT, for plaintiffs in error.

A. HOOD, and H. FIELDER, for defendants in error.

WALKER, J.

The granting and continuing of an injunction must always rest in the sound discretion of the Judge, according to the circumstances of the case. Rev. Code, Sec. 3153. Here are various creditors seeking to enforce their respective claims against the effects of the debtors. The Court, by its proper officer, has possession of the goods, and can so shape its action as to allow all to be heard in vindication of their claims, and award the funds which may be raised, to the payment of those claims which may be entitled thereto. By this course, a multiplicity of suits may be avoided, and ample and complete justice be done in the premises. We fully recognize the general rule, that on the coming in of the answer, plainly and distinctly denying all the facts and circumstances upon which the equity of the bill is based, the Court will dissolve the injunction ; but in some particular cases, the Court will continue the injunction though the defendant has fully answered

the equity set up. The granting and continuing of the process must always rest in sound discretion, to be governed by the nature of the case. See *Coffee vs. Newsom*, 8 Ga. Rep., 19. *Holt vs. The Bank*, 9 Ga. Rep., 554. This Court is not disposed to control the discretion of the chancellor, except in case of abuse of his discretion, and as we see no abuse here, we will not interfere with his ruling.  
Judgment affirmed.

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SINGLETON A. THORNTON, plaintiff in error, *vs.* MOSES HOLLIS, defendant in error.

The Court will not control the discretion of the Court below except in a case where the discretion has been abused.

Motion for new trial or appeal. Decided by Judge ARKE. Randolph Superior Court. May Term, 1867.

Moses Hollis, as bearer, sued Singleton A. Thornton as maker, and Leroy C. Sale as security, for \$500.00 and interest, due on a note made by them 1st January, 1862, and due January, 1863, payable to E. B. Loyless or bearer, with interest from date, alleging that the note was transferred to J. Kimbrough, and by Kimbrough to himself, for valuable considerations, and before the same was due. At May term, 1864, he obtained judgment against both defendants \$500.00, with interest and costs.

At November term, 1866, of said Court, Thornton moved for a new trial or appeal upon the following grounds:

1. Because the judgment was rendered since the 19th day of January, 1861, and before the 6th November, 1866.

2. Because Thornton was unavoidably absent from the Court at date of said judgment, he being in the military service of the Confederate States; and

3. Because Thornton had a good and meritorious defence in said case—said note having been given between the 1st

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the Cincinnati house,   
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for land, at the rate of ten   
Confederate money, when in   
worth in good currency not   
acre.   
verified by Thornton's affidavit.

Hollis admitted the date of the   
but denied that Thornton was unavoid-   
able as his rendition as alleged by him, and averred   
Thornton (as he was informed and believed),   
in said county and in the county site while the Court was   
in session, and that if he was then in such military service, it   
was only in the capacity of an agent for Captain Michael   
Gormsby, quartermaster, for the purchase of corn, said   
Gormsby having at the time his headquarters in said county   
site, and denied that Thornton had a good and meritorious   
defence to said claim, averring that the note was given in   
part payment for a settlement of land, which land (as he is   
informed and believes) was worth ten dollars per acre in good   
currency, that he did not believe anything was said, at the   
time of the delivery of the note, about paying it in Confed-   
erate money, but that the party took it to be paid in good   
currency, and that Thornton was personally served, and   
could not deny notice. This was also verified by affidavit of   
Hollis.

At Hollis' instance, the case was continued, and by order   
of the Court the *fi. fa.* was stayed pending this motion.

The Court refused to grant a new trial or appeal, and this   
refusal is assigned as error.

C. B. WOOTTEN, for plaintiff in error.

B. S. WORRILL, for defendant in error.

WALKER, J.

The granting of a new trial or an appeal upon an appli-   
cation like this, was a matter very much within the discre-   
tion of the Court below. The Court may grant a new trial   
or appeal if satisfied from all the facts that a good and meri-

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Cox vs. Felder, executrix.

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defence exists. Acts 1865-'6, p. 87. In this case he doubt whether any defence at all existed, and he might very properly refuse the application to judgment. A reviewing Court should control the action of the Court below only in cases where the discretion has been abused. Judgment affirmed.

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WILLIAM J. COX, plaintiff in error, vs. SARAH FELDER, executrix *de son tort* of GEORGE D. FELDER, defendant in error.

[Judge Harriss did not preside in this case.]

an officer of one county may issue an attachment returnable to the courts of another.

an executor *de son tort*, who is removing the assets of the deceased of the county, is liable to be attached, and the assets levied on.

attachment. Motion to dismiss. Decided by Judge KE. Webster Superior Court. September Term, 1867.

the foundation of this attachment was an affidavit in these words:

GIA, SUMTER COUNTY :

personally came before me William J. Cox, who, on oath, that George D. Felder, in his lifetime, was indebted to me in the sum of Two Hundred and Eighty-Eight dollars, now due, besides interest, and that since the death of George D. Felder, Sarah Felder has become executrix and meddling with the goods and chattels of said deceased, that she is actually removing the property of said estate to the limits of the county of Webster, so that the ordinary course of law cannot be served on her.

W. J. COX.

and subscribed before me, November 27th, 1866.  
A. SMITH, Notary Public.



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*Cox vs. Felder, executrix.*

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The said Notary issued an attachment returnable to the Superior Court of Webster county, Georgia, to March term, 1867.

A levy was made on certain property, and replevin bond given. At said term, Sarah Felder filed her affidavit, denying the grounds for attachment taken in the affidavit.

At the same term, by her attorney, she moved to dismiss the attachment—

1st. "Because said affidavit does not show a statutory ground for issuing an attachment."

2d. Because said Notary of Sumter county could not issue an attachment returnable in Webster county.

The Court dismissed the attachment, putting his judgment on the last ground aforesaid.

This judgment is brought up for review.

WILLIS A. HAWKINS, for plaintiff in error.

S. H. HAWKINS and R. F. LYON, for defendant in error.

WALKER, J.

1. Before process of attachment shall issue, an affidavit shall be made that the debtor has placed himself in a condition to be attached. Rev. Code, Sec. 3200. Nothing is said as to the residence of the officer; Section 3201 makes it the duty of the officer before whom the affidavit is made to take bond, with good security, for the payment of damages and costs, which the defendant may sustain. Affidavit being made and bond given, the officer before whom the affidavit was made, "or any officer authorized so to do," may issue the attachment returnable to the proper Court. Secs. 3203 and 3205. We find nothing in the statutes which prohibits an officer of one county from issuing attachments returnable to the Courts of another; and believing that the authority is one which may be for the convenience and advantage of suitors, we approve the authority thus conferred, and hold that the officers of one county, authorized by law to issue attachments, may make them returnable to the Courts of

er county, under the provisions regulating the issuing  
 tachments.

The affidavit in this case alleges that defendant "is  
 lly removing the property of said estate without the  
 s of the said county of Webster." This is a compliance  
 the requirements of the Code in such cases—Rev. Code,  
 210. The Court should have sustained the attachment.  
 lgment reversed.

ILHELMS, plaintiff in error, *vs.* NOBLE BROTHERS &  
 Co., defendants in error.

County-Court at its monthly sessions, under the act organizing  
 Court, had jurisdiction in all civil cases in which not more than  
 hundred dollars was "claimed" as damages or principal due; and  
 e the plaintiff in his declaration in said Court claimed only one  
 red dollars to be due him, and the judgment of the Court was for  
 han that sum; under the peculiar language of the statute, giving  
 risdiction to the Court, the judgment should be sustained, not-  
 anding the note, the foundation of the suit, was for a larger  
 nt than one hundred dollars.

re the plaintiff in his declaration claimed only one hundred dol-  
 the mere fact that the copy note attached to the declaration, and  
 de itself when introduced in evidence, was for more than one hun-  
 dollars, was no ground for arresting the judgment.

orari from County-Court. Decided by Judge MIL-  
 Floyd Superior Court. July Term, 1867.

elms prayed process, returnable to a monthly session  
 County-Court of said county, against Noble Brothers  
 to recover one hundred dollars only, claimed by him  
 em, averring that "this is a suit between master and  
 ."

real foundation of the suit was the following paper:  
 2. Wilhems, one hundred and thirty-five dollars.

NOBLE BROTHERS & CO."

orsed.) "Received, June 4th, 1864, in salt, twenty-  
 ars on this note. E. WILHELMS.

h 18, '66, \$14 in United States currency."



At the trial, plaintiff's attorney offered the paper in evidence. It was objected to because it was not dated. The Court overruled the objection; the paper was read in evidence and plaintiff closed.

Defendants' attorneys moved a non-suit for the cause aforesaid. The motion was overruled.

The defendants' attorneys examined plaintiff, who testified that the note was given in 1864, a short time before the first credit, for his labor as a blacksmith; that he worked for Confederate money, at \$1.75 part of the time, and \$2.25 part of the time; that he was now getting \$2 per day for his work.

It was then shown that about 4th June, 1864, Confederate money was fourteen to eighteen for one in gold, and that United States currency was about two for one in gold. And by a blacksmith it was shown that a blacksmith's wages were now from \$2 to \$2.50 per day.

Upon these facts, the County Judge held that defendants were entitled to no reduction, and that plaintiff could recover on said paper as a promissory note, dated 4th June, 1864.

Defendants' attorneys moved to dismiss the case because, under the ruling of the Court, there was due on said paper, \$112.22, besides interest from 18th March, 1866, and the jurisdiction of his Court, at the monthly sessions, was limited to one hundred dollars.

The Judge overruled the motion because there was no plea to his jurisdiction, and allowed plaintiff's attorney to enter up judgment for \$98. There was a motion in arrest of judgment on the same grounds, and it was overruled. *Certiorari* was sued out. To the answer of the County Judge, exceptions were filed, and an order *respondeat ouster* was passed at April term, 1867, of the Superior Court. His second answer brought out no fact not stated above.

At July term, 1867, of the said Superior Court, the case came on to be heard. Wilhelm's attorneys again excepted to the answer for not being full, and moved that the County Judge should again be required to answer, the attorney alleging that such full answer would show clearly that the note sued on was subject to reduction under the ordinance of

Convention of 1865 as to Confederate contracts, and that Wilhelms had claimed but one hundred dollars as due him on, and that it was for his wages as a day laborer and not of the defendants, and this was a suit between master and servant.

Judge MILNER held that, because by the face of the note, one hundred dollars was due thereon, the County-Court, at its monthly session, had not jurisdiction of the case, and the facts sought by a new answer, could not give the jurisdiction. He therefore sustained the *certiorari*. During the term, Wilhelm's attorneys moved to set aside said judgment because it was erroneous. In September, 1867, being the next term, this question came before Judge UNDERHILL. He held that Judge MILNER was right, and refused to set aside his order.

The case is brought up for error.

WILHELM & SCOTT, for plaintiff in error.

WILKINSON & FOUCHÉ, for defendants in error.

WILKER, J.

Under the act organizing the County-Court, (acts 1865-6, 1866-7) jurisdiction was given at the monthly sessions, "with-  
out limit as to amount, in all cases arising out of the relation  
of master and servant," "and all other civil cases in which  
more than one hundred dollars is claimed as damages, or  
as a sum due." In this case the plaintiff claimed only  
one hundred dollars to be due him by his declaration, and there-  
fore according to the peculiar phraseology of the statute, the  
County-Court properly had jurisdiction of the case. The amount  
claimed was within the jurisdiction of the Court, and the  
County-Court attached could not oust the jurisdiction. For myself,  
it is very clear that this was a suit arising out of the relation  
of master and servant, and consequently the Court had juris-  
diction without limit as to amount. My brethren thought the  
jurisdiction maintainable under the statute, because the  
plaintiff only "claimed" one hundred dollars; especially when

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Haines vs. Curry.

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by the judgment of the Court, it appeared that even less than one hundred dollars was due him, and I concurred with them.

If the County-Court, under the provisions of the statute, had jurisdiction of the cause, the amount "claimed," of course the judgment should not have been arrested, because the copy note was for an amount over the jurisdiction of the monthly sessions of the County-Court. The judgment of the Superior Court, sustaining the *certiorari*, must be reversed, and the *certiorari* dismissed.

Judgment reversed.

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NATHAN W. HAINES, plaintiff in error, vs. ELIZABETH CURRY, defendant in error.

1. If the petition and process substantially conform to the requisites of the Code, and the defendant have notice of the pendency of the cause, all other objections shall be disregarded, provided there is a legal cause of action set forth as required by the code.
2. All misnomers in judicial proceedings on the civil side of the Court, are amendable without working unnecessary delay.
3. An amendment of the pleadings is no cause for a continuance, unless the opposite party is surprised thereby, and less prepared for trial in consequence thereof.
4. A mistake of the clerk in copying a declaration, shall work no injury to a party, where, by amendment, justice may be promoted. Therefore, where the clerk, in copying a declaration, inadvertently changed the order of the initials of the name of a party to a copy note sued on, such mistake is no ground for dismissing or continuing the case.

Complaint. Amendment of Misnomer. Tried before Judge GIBSON. Washington Superior Court. March Term, 1867.

This was complaint by Elizabeth Curry, against N. W. Haines, endorser, on a promissory note made by A. O. Haines, and endorsed by said defendant. The clerk in copying the note, wrote O. A. Haines, instead of A. O. Haines, for the maker's name.

At the trial term, plaintiff's attorney moved to take a verdict against said endorser. Producing the copy served on N. Haines, his attorneys showed that this change had been made, and contended that there was no service.

Plaintiff's attorney took the copy, and by leave of the Court, amended it by changing the order of the initials, so as to make them correspond with the original, and the Court, of its own motion, took a verdict.

Defendant's attorneys objected to said amendment, and the Court, after it was allowed, a continuance because of it, but no reason for the continuance except the said amendment.

The allowance of the amendment and the refusal of a continuance, are here for review.

WALKER & CARR, for plaintiff in error.

J. WARTHEN, for defendant in error.

WALKER, J.

That the petition and process substantially conform to the provisions of the Code, and the defendant have notice of the merits of the cause, all other objections shall be disregarded, and there is legal cause of action set forth. Rev. Code, § 39.

Amendments in judicial proceedings on the civil side of the Court, are amendable *instantly*, without working unnecessary delay. Rev. Code, § 3433.

When a party amends his pleadings, the Court may, in its discretion, continue the cause at the instance of the amending party, if the opposite party will make oath, or his counsel will depose, in his place, that he is surprised by such amendment, and that he is less prepared for trial, and how, than he would have been if such amendment had not been made, and that surprise is not claimed for the purpose of delay. Rev. Code, § 3470.

A mistake or misprision of a clerk, or other ministerial error, shall in no case work to the injury of a party, where, by amendment, justice may be promoted. Rev. Code,

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Hurley, *et al.* vs. Gauly and Burke.

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How are the facts of this case? The petition and process were correct, and the defendant had been notified of the pendency of the cause; all other objections should have been disregarded, for there was a legal cause of action set forth as required by the code. The Court then certainly did right to hold the service sufficient.

Ought a continuance to have been granted because the Court directed a change of the order of the initials of the name of the maker of the note, as set out in the copy served on the endorser, and without any cause being shown except the allowance of such an amendment? Most clearly not. The defendant was not surprised by the amendment, and was not the less prepared for trial in consequence thereof. We see no reason why this small mistake of a clerk should work to the injury of the plaintiff. Indeed, no amendment of the copy declaration was necessary, because the defendant had notice of a legal cause of action properly set forth.

Judgment affirmed.

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GREEN B. HURLEY, *et al.*, plaintiffs in error, vs. DAVID D. GAULY and CHAS. R. BURKE, defendants in error.

1. Where the Court below grants a new trial, and no principle of law is violated, this Court will not disturb the ruling.
2. This Court will more reluctantly control the action of the Court below where a new trial has been granted, than where one has been refused.

Assumpsit. Motion for new trial. Tried before Judge CLARKE. Stewart Superior Court. April Term, 1867.

This was assumpsit upon a parol sale of cotton for Confederate money.

Plaintiff introduced the evidence of John B. Richardson, to the effect that, thrice in 1865, he called on Hurley for three thousand pounds of lint cotton, as having been sold by Hurley to plaintiff; that Hurley denied having sold plaintiff any cotton, but afterwards, on the same day, he said

Witness he had no cotton, and plaintiff must wait till he got it, and did not deny the sale and the payment of the price for the cotton; lint cotton was, at the time of demand, worth from forty-two to forty-five cents per pound in that market and in the present currency. Plaintiff closed.

Defendant was then examined as a witness in his own behalf. He testified that some time in 1864, Gauley tried several times to buy from him three thousand pounds of lint cotton, and at each time Gauley was reminded that Confederate money was fast depreciating, and Hurley doubted whether he could use the money in payment of his debts, and asked that if he could so use the money, he would take the offered price, to-wit: sixty cents per pound; Gauley offered to pay that price, on condition that he would take the money if Hurley could not so use the money, until the next time he offered to buy; it was then agreed that Gauley should pay that price, and if Hurley could not so use the money he would return the money to Gauley. The exact date of this trade was not remembered, it was in the year 1864, and before Christmas.

Gauley tried to pay James Matthews and Benjamin Pinkerton two of his creditors in said county, \$——, which he offered them respectively—they refused to take the money; he offered it twice, once before the close of the war and once after it ended, tendered it back to Gauley, and he refused to receive it. His tender was some time after Christmas, between January and March, 1865.

Gauley also stated that he did not recollect the conversation had by Richardson, that Gauley did not pay for the cotton at the time of the agreement, but a few days thereafter he paid it; Burke paid him for the cotton, Gauley being the owner. No time was appointed by plaintiffs for the delivery of the cotton, but witness intended, if he could use the money, to appoint a time and deliver the cotton, which was his gin-house; he did not know Burke in the trade; he told Burke he would deliver the cotton; the cotton was middling quality.

Defendant closed.



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Hurley, *et al.* vs. Gauley and Burke.

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In rebuttal, BURKE was examined, who testified that when he paid Hurley for the cotton, Hurley said he was then very busy, but would soon gin, pack, and let him know it; Burke replied that he had rather have it at the gin-house than in town, and it was then understood between them that Hurley would gin and pack it and keep it at the gin-house till called for by plaintiff; plaintiff afterwards sold the cotton to Richardson, as agent for Long, of Augusta, and authorized Richardson to call for it; at the time of the sale cotton was not worth sixty cents per pound in that county in Confederate money, and witness complained at Gauley's giving so much for the cotton.

The evidence being closed, the Court charged the jury as follows :

The case under consideration falls under the ordinance of the Convention regulating contracts made between 1st January, 1861, and 1st June, 1865, and shall receive an equitable construction, etc., and the verdict of the jury shall be rendered on principles of equity.

I shall proceed to advise you what are the principles of equity applicable to this case. It is claimed by the defendant that the purchase of the cotton was conditional, that if he could not use the money in payment of debts, Gauley was to take it back and rescind the trade, that defendant tried to use the money as agreed, failed to get it off, and afterwards tendered it back to Gauley, who refused to receive it, but held on to the contract. If Gauley agreed to rescind the trade should the money prove unavailing to defendant, and if defendant promptly and in good faith tested its availability and finding it unavailing for payment of debts, tendered it back promptly, plaintiffs were bound to receive it and release the cotton, and if they refused to receive it and release the cotton, defendant is released from the trade.

In order to release the defendant upon this ground, it should appear that he proceeded within a reasonable time to test the value of the money, and that on finding it useless he tendered it back at the earliest opportunity. If he kept the money an unnecessarily long time, and especially if in the

untime it depreciated in value, plaintiffs are not bound to take it back, but were entitled to insist on the purchase. If defendant made this trade in the fall of 1864, for Confederate money, known to be in a depreciating condition, and not tender back the money until between January and March, 1865, and if plaintiffs and defendant and defendant's creditors to whom the money was offered resided in the same locality, and no good cause be shown for not returning it earlier, in the opinion of the Court defendant had kept it too long, and by his negligence lost the right to force it back on plaintiffs. In such case, the sale and purchase lost the condition and became absolute, and if defendant afterwards failed to fulfill it he is liable.

The plaintiffs claim that they bought three thousand bales of lint cotton from defendant and paid him for it, he gave them the cotton at his place and being bound to deliver it on demand, that they demanded it through their agent and defendant refused to deliver it. If such are the facts proved, plaintiffs are entitled to be paid what they have been damaged by such breach of the contract.

If the contract of purchase was based on an adequate consideration, and such a failure of defendant to fulfill it occurred, then plaintiffs are entitled to recover the full value of the cotton at the time of such demand and refusal, with interest to this date. Should you find for the plaintiffs upon this question, in ascertaining the amount of the damages, you should take into the account the inadequacy of the price if such inadequacy existed, and on account of such inadequacy you should reduce the plaintiffs verdict to what would be their actual damages by the breach of the con-

In determining whether the consideration be adequate, you should consider whether the price paid was the fair market value at the time and place of the purchase. If the plaintiffs received twenty cents per pound for the cotton in Confederate money, and if that was the market value thereof at the time of the trade, then however small the price may seem to you now to be, yet it was an adequate consideration,

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Hurley, *et al.* vs. Gauly and Burke.

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and such a sale based on such a consideration, and with a breach as above stated, entitles the plaintiffs to recover the full value of the cotton at the time when demanded and refused, with the interest on such sum to date.

The jury found for the defendant.

Plaintiffs thereupon moved for a new trial, because the verdict was contrary to the law, against the evidence, and against the charge of the Court.

The Court granted a new trial, and this is assigned as error.

B. S. WORRILL and M. GILLIS, for plaintiffs in error.

J. L. WIMBERLY and E. H. BEALL, represented by the Reporter, for defendant in error.

WALKER, J.

1. The Court below was dissatisfied with the verdict in this case, and granted a new trial. When the Court below grants a new trial, and no principle of law is violated, this Court will not disturb the ruling. The effect of his ruling is simply to allow the parties another hearing before another jury.

2. No rights are concluded by it, and therefore this Court will more reluctantly control the action of the Court below in granting than in refusing a new trial. In the one case the parties are remitted to a standing in Court, to have their rights passed upon according to the law and evidence applicable to the case; while on the other, the rights of the respective parties are decided finally. Hence, the refusal of the Court to grant a new trial is an important matter for the interest of the parties, and should be more thoroughly and critically examined than when the effect of his ruling is simply to place the respective parties in a condition to litigate their rights, untrammelled by an adjudication of the merits of the controversy.

Judgment affirmed.

O. BROWN, plaintiff in error, *vs.* ELIZABETH PADGETT,  
defendant in error.

promissory note given to suppress a prosecution for felony is void.

*Artiorari* from the County-Court. Decided by Judge  
FIN. Pickens Superior Court. April Term, 1867.

In the County-Court a suit by Elizabeth Padgett against  
Brown, founded upon a promissory note for \$50, dated the  
1st of December, 1865, and due 1st of January, 1866, was  
granted on the grounds that it was taken by duress, was  
without consideration, and was illegal and void because it was  
given to settle a criminal prosecution for simple larceny, or  
for stealing.

In the trial, the plaintiff read in evidence the note, and  
proved it.

The defendant then examined S. M. Morton, a Justice of  
Peace, who testified that David Townsend came to him  
and procured a warrant against the defendant, Brown, for  
stealing Elizabeth Padgett's horse; Brown was arrested on  
the warrant; witness understood that defendant gave him  
\$50 for the horse, and plaintiff and prosecutor were  
to prosecute the prosecution or dismiss it; it was dismissed.

The warrant was read in evidence. It was on the affidavit  
of David Townsend, and charged that on the 4th of November,  
1865, in Pickens county, Ga., Brown (as deponent believed)  
stole a sorrel horse about eleven years old, the property of  
Elizabeth Padgett, of the value of \$75, &c. It was dated  
November, 1865; the warrant was issued on the 1st of  
November, 1865; the arrest was made on the 2d of Decem-  
ber, 1865; on the 3d of December, 1865, the Justice of the  
Court endorsed on the warrant: "The decision of the Court  
is to dismiss the warrant by consent of parties.

S. M. NORTON, J. P."

C. ANDERSON then testified: that he and defendant at  
the time lived in Tennessee, and were in Pickens county on  
the trial; defendant was arrested on the warrant, gave said note

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*Brown vs. Padgett.*

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to settle the case ; witness advised defendant to give security for his appearance, but he said he thought he could settle the case.

JOHN TALLY testified: that he and Hix Patterson were called on to settle or arbitrate the case, that they decided Brown should pay plaintiff for the horse, and plaintiff should settle or dismiss the warrant. They had no evidence before them that Brown took or got the horse, and none that he did not take or get it; plaintiff charged him with it, and he denied it. Brown had lived there before, had moved to Tennessee, and was then in Pickens county on a visit, and since that time has moved back to Pickens county. Witness and Hix Patterson decided that Brown should pay \$50 for the horse ; but they had no evidence against him, and did not try the question of his guilt or innocence.

In rebuttal, plaintiff examined HIX PATTERSON, who testified ; that Brown was in the county at or about the time the horse was taken.

The verdict was for the plaintiff. *Certiorari* was sued out upon the grounds that the Court, in charging the jury, said there was no evidence that Brown took the horse, that the verdict was against the evidence and law, and because "the horse the award was given for, never was the horse of plaintiff, that her horse was eleven or twelve years old, and the horse the award was given for, was seventeen years old, and further, he can prove by John Powell, that on the night plaintiff's was taken, he was at home all night."

The answer of the County-Judge was, that the foregoing was a correct statement of what occurred on the trial, with this addition, that he did tell the jury they were not trying whether Brown stole the horse, and rehearsed to them what the witnesses testified, and also told them that they were the judges of what was and what was not proved ; and also, that if the note was given to settle the prosecution, it was illegal and void, and as to this, they were to judge from what the

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Roe and Ralston *vs.* Doe and Dover, *et al.*

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nesses said. When the *certiorari* was heard before Judge WIN, he ordered the same dismissed.

This is complained of by Brown, and assigned as error.

W. T. DAY, JNO. A. WIMPEY, for plaintiff in error.

W. H. SIMMONS, for defendant in error.

WALKER, J.

The evidence showed that the note sued on, was given to press a prosecution for felony, and is therefore void; the transaction itself was criminal, Rev. Code, Sec. 4423; and the note had been paid, would have been no defence to an action for the *tort*, the alleged taking of the mare. Rev. Code, Secs. 2999, 3000. Such being the case, the Court erred in dismissing the *certiorari*.

Judgment reversed.

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*Cas. Ejector*, and ROBERT RALSTON, tenant, plaintiffs in error, *vs.* DOE, *ex. dem.*, of FRANCIS DOVER, *et al.*, defendants in error.

Any one who claims to be the landlord of a defendant in ejectment, cannot, as a matter of right, and against plaintiff's objections, be made a co-defendant, where it appears to the Court that all the title he sets up, was acquired subsequently to the bringing of the action. The refusal of the Court to permit such a party to be made a co-defendant, is no ground for a new trial, especially where it appears that he had on the trial all the advantages of his title in favor of the possession of his tenant, in whose name he was permitted to defend, and it appears from the whole case that justice has been done.

Verdict. Motion for new trial. Decided by Judge Gilmer Superior Court. May Term, 1867.

This case came up on an agreed statement of facts certified to the Court by the Judge. It was decided in favor of Doe, *ex.*

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Roe and Ralston vs. Doe and Dover, *et al.*

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*dem.*, of Francis Dover, *et al.*, vs. Roe, casual ejector, and Robert Ralston, tenant, for land, lot No. 27, 6th district, and 2d section of said county, containing 160 acres, and for mesne profits. It was commenced 31st January, 1860.

The plaintiff's evidence was as follows:

Grant from the State for said lot to John Peck, dated 1st July, 1843; John Peck's deed to James M. Smith, dated 10th January, 1849; said Smith's deed to A. D. Jenkins, dated 1st May, 1857; said Jenkins' deed to Judge Hambry, dated 21st of March, 1859; said Hambry's deed to said Dover, dated the 14th November, 1857; all these deeds were for said lot, and were recorded on the 29th of September, 1860.

Plaintiff then proved by the sheriff the *locus* and the possession of said tenant when the suit was commenced.

WM. HOLT testified: that Josiah Clayton first went into possession of said lot in 1845, or 1846, and remained one year, then Kelly went in and stayed one year, and the lot was then unoccupied for two or three years, till Ralston moved into the house (built by Clayton) in 1850, or 1851, and Ralston had ever since been in possession. Ralston cleared four or five acres of the land, planted a small orchard of apples and peaches, but did not claim the land in his own right. The rents were worth about \$15 *per annum*, and Ralston's improvements were worth about \$35.

BERRY ROCKLEY testified substantially the same, adding that Josiah Clayton claimed nothing but the improvements.

ELIAS CLAYTON testified substantially the same, and that in 1859, Ralston proposed to buy the lot from Jenkins.

RILEY CLAYTON testified: that he lived near the lot, that Ralston did not go into possession till the spring of 1853, and that he never heard Ralston claim or disclaim the lot.

Here the plaintiff rested his case, and defendant introduced the following evidence: A deed from Josiah Clayton to Stephen Smith, dated 1st of February, 1850; a deed from Stephen Smith to Josiah Clayton, dated 20th June, 1853; a deed from Josiah Clayton to J. B. Rockley, dated 4th July, 1853, and a deed from J. B. Rockley to Ralston, dated 1st of Jan-

ary, 1860, all for said lot, and recorded on the 14th of May, 60.

ROCKLEY then testified: that Josiah Clayton went into possession of said lot about 1845, that Ralston went into possession in 1851 or 1852, that he cleared about five acres of it, planted an orchard, making improvements worth about \$35. SEABORN HOLT testified the same in substance.

SAMUEL RALSTON, defendant's nephew, testified: that defendant claimed under Samuel M. Ralston, (heard defendant say so before this suit was brought) and that defendant got into possession in 1851.

The verdict was for the plaintiff, for the premises in dispute and costs.

A new trial was moved for on the grounds that the verdict was contrary to the charge of the Court, against law and evidence, &c., because of newly discovered evidence, and because the Court erred in refusing to permit Samuel M. Ralston to be made a party defendant.

It does not appear what the charge of the Court was. It is agreed that the Court refused to allow Samuel M. Ralston to be a party because his deed was made after suit brought. The newly discovered evidence was, that General A. J. Hansel knew John Peck, of Morgan county, Georgia, by whom the deed to Smith purports to be signed, (by his mark) and knew that said Peck was a good business man and wrote the deed. This was stated in an affidavit by Ralston, with the statement that Hansel had so told him since the trial, that he did not know it before, and that he verily believed said deed with Hansel was a forgery. No affidavit from Hansel was presented, nor any reason given for not presenting it. The Court refused a new trial, and this is brought up for review.

MR BOYD, for plaintiff in error, contended that S. M. Ralston should have been made a party, and cited Adams on Error, 287-9; that Ralston's title was good by the statute of limitations, and cited 5th Ga. Rep., 39, and 25th Ga. Rep.,



178 ; and that defendant might show title in third person, and bar recovery, and cited 11th Ga. Rep., 121.

JAMES R. BROWN, for defendant in error.

WALKER, J.

We are satisfied that justice has been done in this case. It is true that a landlord may be made a co-defendant with his tenant, when the tenant is sued for the possession of the land, and he may also defend in the name of his tenant. In this case, Samuel M. Ralston purchased the land after suit was brought ; in other words, bought a law-suit. On the trial, his deed was admitted in evidence ; no testimony which he offered was rejected ; he had the full benefit of any defence he was able to set up. Under this state of facts, shall a new trial be granted in order that another jury may pass upon the same evidence ? The present verdict is right ; it was rendered after Samuel M. Ralston had exhibited his title and urged all he had to say in its favor. We can see no good reason for remanding the case. Perhaps if we thought that justice had not been done, we might seize upon this as a ground upon which to set aside the verdict ; though during the present term, in the case of Richardson vs. Harvey, from Floyd, we held, that in proceeding to eject a sub-tenant, holding under the party renting the land, it is discretionary with the Court to allow the party renting to be made a party to the suit, or to require him to defend in the name of his sub-tenant. Of course, if the discretion of the Court were abused, this Court would correct it. We see no abuse of discretion in this case.

Judgment affirmed.

THE COVINGTON MILLS COMPANY, plaintiff in error, *vs.*  
JOHN W. B. SUMMERS, administrator of ANDREW J. SUM-  
MERS, defendant in error.

Where a case is fairly submitted to the jury, no principle of law violated,  
and it appears from the whole case that substantial justice has been  
done, a new trial should not be granted.

Assumpsit. Motion for new trial. Decided by Judge  
SPEER. Newton Superior Court. September Term, 1867.

Summers, administrator, sued certain persons composing  
The Covington Mills Company upon the following writing :

“COVINGTON, GA., July 22d, 1864.

“\$15,611.00.

“One day after date Covington Mills Company promise to  
pay A. J. Summers; surviving copartner of Starr & Sum-  
mers, or order, Fifteen Thousand Six Hundred and Eleven  
Dollars, value received in current funds.

W. F. KENNEDY,  
Agent Covington Mills.”

On the note was a receipt for \$5,000.00, December 28th,  
1864, signed by Mrs. Elizabeth Summers and by Mrs. Mattie  
Starr, by R. L. Williams; and another receipt for \$1,000.00,  
30th January, 1865, signed by nobody.

The plea was general issue. The record shows no plea.

On the trial, plaintiff read in evidence said writing, and  
examined as a witness ROBERT L. WILLIAMS, who testified  
that the writing was given for cotton, that some of it was  
delivered, (he did not know how much) some at an old store-  
house in Oxford, Ga., where it was taken out and weighed  
and delivered to Kennedy on the day before the note was  
taken; that it was put back into the storehouse where there  
was other cotton, and on the day after the note was given the  
cotton was burned up; that he did not know the price at  
which the cotton was bought, nor the quantity, but thought  
there were thirty or forty bales; that Kennedy said he did  
not wish any more of the cotton delivered at the Factor

was afraid it would be burnt, and would rather risk it where it was ; that he (witness) had nothing to do with the delivery of any other cotton except that at the storehouse in Oxford ; and that Confederate money was as compared with gold twenty for one. (He did not say at what time).

Plaintiff then testified, in his own behalf, that the note was given for cotton, at one dollar per pound ; that the contract had been made some time before, and was only consummated on the day the note bears date ; that he took the note as agent for A. J. Summers, who was then in Atlanta, in the army, and was wounded the day the note was made, and died one month afterwards ; that he commenced delivering the cotton at the Mills, and hauled one day with two wagons, and thought they hauled two or three bales at a load, and about three loads each, (making about eighteen bales) to the Mill ; that some of the cotton was delivered at Oxford and some at Stone's plantation in Walton county, that at Oxford being delivered by taking it out of the storehouse and weighing it, and that at Stone's plantation being delivered by defendant agreeing that it should remain there and be considered as delivered, (and then he gave the note) ; that there were in all thirty-three bales of the cotton ; that the money was not demanded till October or November, 1865, because A. J. Summers was dead, and no administrator on his estate had been qualified ; that at the date of the demand cotton was selling for about forty-five cents per pound ; that, after the sale, cotton went up to \$1.50 per pound in Confederate money, but was worth but little between the sale and the cessation of hostilities, because of its precarious condition.

Major S. ZACHARY testified for plaintiff, that in June, 1865, he was authorized to give ten cents per pound, in gold, for cotton, but would not try to purchase any till he was authorized to give fifteen cents per pound in gold, and at that price could not buy a bale ; in November, 1865, he paid forty-five cents per pound on short credit for cotton, but for cash it could have been bought for forty-one cents per pound ; from July, 1864, to the close of hostilities, cotton was worth

t little, nobody would buy it, they feared it would be  
rent or destroyed.

Plaintiff closed.

KENNEDY was examined as a witness for the defence. He  
tified that he was in Mississippi, and not in Georgia, until  
close of the war, that he came back to Georgia in June,  
65, that cotton was then worth fifteen cents per pound in  
enbacks, and went up to forty-one cents per pound.

Defendant also read in evidence the following receipt :

"OFFICE COVINGTON MILLS, Jan. 26th, 1866.

Received of J. M. Kennedy, Treasurer Covington Mills,  
e Hundred and Fifty Dollars, on account Cotton.

J. W. B. SUMMERS,

Administrator of A. J. Summers."

The charge of the Court was as follows :

The ordinance of the Convention made it my duty to  
w to go to the jury in evidence the consideration of the  
ract, the value thereof at any time, the kind of currency  
hich the contract was to be discharged, and the value  
of at any time, and aided by these lights you are to find  
dict upon principles of equity between the parties. It  
t in your province to substitute a new contract for the  
es, but these lights are given you to enable you to arrive  
conclusion as to what was the true intention of the  
es, and to find a verdict in accordance with that inten-  
on principles of equity."

e verdict was for \$1,732.70 and costs.

endants moved for a new trial on the grounds that the  
et was contrary to evidence, etc., and against the charge  
e Court and the law.

e Court refused a new trial, and defendants excepted, etc.

IN J. FLOYD, for plaintiff in error.

W. CLARK, for defendant in error.

WALKER, J.

There is no complaint that this case was not submitted fairly to the jury. The complaint is that the verdict is too large. The Judge before whom the case was tried appeared to be satisfied with it; and in looking into the facts as they appear in the record, we think justice has been done. This was a fit case for the jury "to adjust the equities between the parties," and they succeeded very well. Where no principle of law has been violated—and from the whole case it appears that substantial justice has been done—this Court is slow to disturb the verdict of a jury.

Judgment affirmed.

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WM. A. CREAMER, plaintiff in error, vs. ELIZA CREAMER and N. A. SMITH, Solicitor General, defendants in error.

1. Where the Solicitor General is appointed to see that the grounds of a divorce are legal, and sustained by proof, (under Section 1730, Rev. Code) he may introduce evidence, and enter fully into the defence of the case.
2. The Court has no authority to order the husband to pay the Solicitor General for this service. Counsel fees are allowed as "expenses of litigation," and can be granted only on the application of the wife.

Divorce. (Fees of Solicitor General appointed by the Court.) Decided by Judge VASON. Decatur Superior Court. April Term, 1867.

This was a libel for divorce pending *ex parte*. The Court appointed the Solicitor General to see that the grounds of the action were legal and sustained by the proof.

At the trial, the Solicitor General proposed to enter fully into the defence of said cause, and offered evidence of recrimination against complainant. He was allowed to introduce such testimony, although it was objected to by complainant's solicitor.

Afterwards, upon motion of the Solicitor General, the Court, against the protest of complainant's solicitor, ordered complainant to pay the Solicitor General fifty dollars as a fee. The allowance of this general defence and introduction of testimony, and the order of the Judge as to the fee, are signed as error.

R. F. LYON, for plaintiff in error, cited §§1578, 1687, 1688, 1689, 1690 and 1696 of the Code.

V. A. HAWKINS for N. A. SMITH, Solicitor General, defendants in error.

WALKER, J.

Where a divorce case is proceeding *ex parte*, it is the duty of the Judge to see that the grounds are legal, and sustained by the proof, or to appoint the Solicitor General, or some other member of the Court, to discharge that duty for him, Rev. Code, Sec. 1730. This provision was doubtless incorporated in the law to prevent divorces from being collusively obtained. The grounds of divorce are specified with particularity, and it is made the duty of the Judge before a divorce is procured, to see that the party obtaining it, is under the law and the evidence entitled to it. The provision on the subject was not made as a mere form, but imposes a serious duty upon the Judge to see that the laws are faithfully administered in regard to divorces. It certainly was right and proper for the Solicitor General to bring to the knowledge of the Court and jury the facts in his power to show that the applicant was not, under the laws of the State, entitled to a divorce. He is entitled to credit for his efforts in behalf of our public policy, whether he can be compensated, must depend upon the action of the Governor." Rev. Code, Sec. 1640.

On motion, the Court ordered the libellant to pay fifty dollars for the services of the Solicitor General in defending the case, and this order is excepted to. We are not aware of any provision of law justifying such an order. If it would be lawful at all, we suppose it could come in only as "expen-

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Smith *vs.* Smith, Adm'r.

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ses of litigation," and would seem to be granted only on the application of the wife. Rev. Code, Sec. 1732. In the absence of any express provision to justify the granting of this order, perhaps it would be better to leave the question of the compensation of the State's officer, for services of this character, to the discretion of the Governor, who may, if the State be an interested party, pay the fee.

Judgment reversed.

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ANNA E. SMITH, plaintiff in error, *vs.* CHARLES H. SMITH, administrator of WILLIAM R. SMITH, deceased, defendant in error.

The approval by the Ordinary of the election of a widow to take an amount of money, to be assigned to her absolutely in lieu of her dower, should be obtained before commissioners are appointed to assign dower.

Petition for Money in lieu of Dower. Tried before Judge MILNER. Floyd Superior Court. July Term, 1867.

At July Term, 1866, of said Court, Anna E. Smith filed her petition, showing that she was entitled to dower out of the lands of deceased, that he died seized of certain thirteen country lots in said county, containing about two thousand acres, and two lots in Rome, Georgia, and praying that commissioners be appointed to assign her dower or a sum of money out of the estate of deceased absolutely, in lieu of dower.

The Court appointed such commissioners. They made their return, assigning her dower in the lands by metes and bounds, or, if she preferred it, \$12,000.00, to be paid her by the administrator.

Black, Cobb & Co., endorers for and creditors of deceased, objected to the assignment of \$12,000.00, because it was too much. Nathaniel N. Smith, a mortgage creditor of deceased, also objected thereto for the same reason, and because it was

made before the sale of the lands and without reference to the market value thereof, and because it was made before petitioner had elected to take money in lieu of dower, and before the Ordinary had approved such election.

At January Term, 1867, of Floyd Superior Court, the parties were at issue as to the first objection taken by each, and the other objections taken by Nathan M. Smith were overruled.

Thereafter, to-wit, in April, 1867, Mrs. Smith petitioned the Ordinary of Floyd county for his consent and approval of the election of money, instead of lands, as dower.

The Ordinary, having notice of the objections of creditors said assignment, ordered, at May Term of his Court, in 1867, that all persons interested in the matter should show cause, before him, on the 8th of July, 1867, why he should give such assent and approval.

On said last named day this action was had in the Court of Ordinary :

“COURT OF ORDINARY, July Term, 1867.

On hearing this application, and both parties agreeing thereto, it is ordered, that the election of a sum of money in lieu of dower, to belong absolutely to the widow, to be determined by commissioners according to law, be approved, without approving of the sum already assessed.

JESSE LAMBETH, Ordinary.”

On this appearing to Judge MILNER, at July Term, 1867, of said Superior Court, and upon motion therefor made and argument had, he set aside the assessment of the \$12,000.00, on the ground of the want of such antecedent approval of the same required by law.

It is said to be erroneous.

WRIGHT & BROYLES, for plaintiff in error.

H. HILL, for defendant in error.



WALKER, J.

Under the facts of this case, the Court very properly held that an assessment should be made after the approval by the Ordinary of the election by the widow to take money in lieu of dower. A sum of money had been set apart for her by commissioners, and the creditors of the deceased were resisting a judgment of the Court awarding it to her. Pending this issue, both parties appeared before the Ordinary, and by agreement it was "ordered that the election of a sum of money in lieu of dower, to belong absolutely to the widow, *to be determined* by commissioners according to law, be approved, without approving of the sum already assessed." The proper construction of this order, passed by "both parties agreeing thereto," is that an assessment should thereafter be made by commissioners appointed for the purpose. The Ordinary expressly declined to approve the assessment already made, and it is unreasonable to suppose that the creditors intended to abandon their objections to the amount awarded by the commissioners, for that was the whole controversy. The order of the Superior Court setting aside the award of the commissioners was right. Of course, under the proceedings already instituted, new commissioners may be appointed, and the amount of money to belong to the widow ascertained.

The rule adopted in this case is better, and in accordance with the provisions of the Code. Sec. 1761 of the Revised Code provides for the election in lieu of dower of an amount of money to belong absolutely to the widow, with the assent of the administrator and the approval of the Ordinary. This would seem to require, as a condition precedent to her right to a sum of money to belong absolutely to her in lieu of dower, the approval of the Ordinary; and we think as a general rule such approval should be obtained before commissioners are appointed. If the widow elect to take dower, she can have that assigned to her; if she elect a life-estate in one-third part of the proceeds of the sales of the land in lieu of dower, with the assent of the executor or administrator of

ne estate, she can have that—Rev. Code, Sec. 1760; and with the assent of the executor or administrator, and the approval of the Ordinary, an amount of money may be awarded to belong to her absolutely, in lieu of her dower. But in either event she should elect which she will take, and on the proceedings should be taken to carry out her wishes, it can be done, according to law. Many reasons might be given why the rights of all parties are more likely to be secured by this course than by the appointment of commissioners in advance of her election of which she will take; but the expressed will of the Legislature is a sufficient reason, without more.

Judgment affirmed.

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THE EUFAULA HOME INSURANCE COMPANY, plaintiff in error, *vs.* PLANT & CUBBEDGE, defendants in error.

Defendant at common law, against whom a judgment was rendered, and also against his surety on bond given to dissolve a garnishment, entered an appeal, giving as his sole security the same person who had been given as security on the bond to dissolve the garnishment, and against whom judgment had already been obtained. On motion, made at the next term on the appeal, the Court dismissed the appeal, holding that security had been given and none could then be given: *Held*, that the decision was right.

Motion to dismiss appeal. Decided by Judge COLE. Bibb Superior Court. May Term, 1867.

Plant & Cubbedge sued out attachment against said Company as a foreign corporation, and served Mr. Granniss, the Company's agent, with garnishment. The Company dissolved the garnishment by giving bond for the eventual condemnation money, with George R. Barker as security.

November Term, 1866, a verdict for \$2,000.00 was rendered against the Company, and thereupon judgment was entered up against it and its said security. The Company, at said term, gave an appeal bond in the usual form,

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Eufaula Home Insurance Company *vs* Plant & Cubbedge.

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giving only said Barker as security thereon, and the case was entered on the appeal docket.

At the next term, Plant & Cubbedge moved to dismiss the appeal because no security was given on the appeal bond. Thereupon the Company moved to amend the bond by substituting other security in *lieu* of Barker.

The motion to amend was over-ruled and the appeal was dismissed. The plaintiff in error alleges that the Court should have allowed the amendment, and should not have dismissed the appeal.

W. POE, for plaintiff in error, cited *Davis vs. Anderson*, 1st Kelly Ga. R., 192; 15th Ga. R., 110; 18th Ga. R., 371; and 34th Ga. R., 268.

LANIER & ANDERSON, for defendants in error, cited Code of Georgia, §3468; *Gordon; et al., vs. Robertson*, 26th Ga. R., 410; and contended that this case was not within the reason of the cases cited by Mr. Poe.

WALKER, J.

This case is fully within the principle decided by this Court in the case of *Gordon vs. Robertson*, 26 Ga. R., 410. There, as here, judgment had gone against all the parties who signed the appeal bond. Here was no attempt or offer to give any security. There was neither a compliance, nor an attempt to comply, with the requisitions of the statute, to give the plaintiff security for the eventual condemnation money. There is nothing like this case in any of the adjudicated cases, and they have gone quite far enough.

Judgment affirmed.

JOE L. COBB, plaintiff in error, vs. MEGRATH & PATTERSON, defendants in error.

[Judge HARRIS did not preside in this case.]

entitled a party to recover the possession of personal property by possessory warrant, he must show that the property had previously been in his possession.

possessory Warrant. *Certiorari* from County-Court. Granted by Judge CLARKE. Randolph County. November 1867.

The bill of exceptions and evidence therein, (there is no objection) makes the following case:

Joe Cobb sued out a possessory warrant against Megrath & Patterson, before the Judge of the County-Court, for a bale of cotton.

At the trial, R. R. Swepson (plaintiff's agent, who had obtained the warrant as such) testified, that he held claims for cotton from Varner, against J. L. Varner, and that he went to Varner's place on the 28th October, and Varner turned over to him as part payment of said claims, a bale of cotton, which was the only one then packed at the gin, and agreed to send it to Cuthbert, to the stable yard of C. A. Boynton, that he sent it, and when it came to Boynton's lot, Swepson was the driver of the vehicle that he could take the cotton the next morning and put it away, and that before he went to the stable next morning, some one had removed the cotton. BOYNTON testified: that on the 28th October, said Varner informed him that he had turned over to Swepson, on said claim, a bale of cotton, and on that night Varner sent a bale of cotton to his (Boynton's) lot, and when he (Boynton) went to the stable next morning, between sunrise and daylight, the cotton was gone.

The defendant offered in evidence, the following note:

OCTOBER 22, 1867.—R. H. BAKER & Co.—*Gentlemen:* Send me by the bearer, 200 lbs. of side bacon. I will pay a bale of cotton to you on Friday evening, or early

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Cobb vs. Megrath & Patterson.

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Saturday morning. My hands are entirely out of bacon, so I must have some. I would come up for it myself, but for attending to the ginning of the cotton for you.

Respectfully,

J. L. VARNER."

It was ruled out by the Court.

JACOB L. COBB (of the firm of R. H. Baker & Co.) was then introduced and testified: that Varner was to let him have a bale of cotton for provisions, on Friday or Saturday last, that Varner told him the cotton was ginned and ready, and would be sent up on Saturday, and Varner waited at his (Cobb's) store that night till nine o'clock, waiting the arrival of the cotton, and that on the morning of the 29th October, Varner came to his store with the wagon, and delivered the cotton, saying he had brought that bale of cotton, and that he had no knowledge of plaintiff's claim or any dispute about the cotton, till after it was in his possession. He would not swear that this was the bale of cotton which Varner had had promised to his firm.

JEFF SNELL (negro) testified: that he was employed by Varner, came after and carried home the bacon, on next day took the cotton, by Varner's order, to the gin to be ginned to pay for the bacon, and on Friday he went for the cotton to take it to town, to Cobb, on Saturday; that when J. L. Varner left home, he ordered him to take the cotton to Cobb, and that he was prevented from doing so by C. L. Varner's ordering him to haul sugar-cane; that when he left home on Monday (28th) with the cotton, J. L. Varner ordered him to drive to Boynton's stable yard and camp, and keep the cotton until next morning, and then carry it to Cobb, and this he did, J. L. Varner being with him, at Cobb's store, when he delivered it there, and that this was the bale ginned for Cobb.

It was conceded that this was the same cotton about which Swepson testified as having been at the gin and at the stable.

The Judge of the County-Court ordered the cotton delivered to Megrath & Patterson.

Cobb, by *certiorari*, took the cause before Judge CLARKE, alleging that the Judge of the County-Court had erred in

eting said note as evidence, and in delivering the cotton Megrath & Patterson.

Judge CLARKE affirmed the judgment of the Judge of the County-Court, and this is assigned as error.

L. FIELDER, for plaintiff in error.

WEST HARRIS, by A. HOOD, for defendant in error.

TALKER, J.

The bale of cotton in controversy, was raised by, and was in possession of J. L. Varner, and the weight of the evidence shows that he retained possession of it until he delivered it to Cobb. It is true that Swepson, the agent of Megrath & Patterson, says that Varner "turned over" to him the bale of cotton in part payment of a claim, "and further agreed to deliver said bale of cotton to Cuthbert to the stable yard of C. Wynton." This shows that the possession of the cotton remained with Varner, and by his order the negro delivered it to Cobb. The question of title cannot be tried in this way. A writ of replevin lies only where the party complaining has been in possession of the property in controversy, and it "has been taken, enticed, or carried away, either by fraud, violence, or other means, *from the possession* of the party complaining, or that such personal chattel, having recently been in the quiet, peaceable and legally acquired possession of such complaining party, has disappeared without his consent, and, as he believes, has been received, or taken possession of by another party complained against," &c. Rev. Code, Sec. 3956. In the case of Meredith vs. Knott & Hollingsworth, 34 Ga. Rep. 100, the court established a different rule. We do not think so. In the case the defendant acknowledged that plaintiffs were in possession of the four bales of cotton in controversy. In affirming the opinion of the Court in that case, the Judge said: "After the plaintiffs had purchased the cotton and delivered it *with the defendant*, his possession was that of the

*plaintiffs*. They had a right to go and take it whenever they chose; but when this was denied, and the defendant refused to let them have it, the *possession was changed*, and that of Meredith was wrongful, tortious and fraudulent." Page 225. Judge LUMPKIN did not preside in this case—one of the parties being a relative. The Court there hold that the party complaining must have been deprived of the possession of the property, or he cannot maintain a possessory warrant. I think myself that the case cited went to the very utmost limit of the law touching possessory warrants. If it meant to decide that a constructive possession in the plaintiff will enable him to maintain this proceeding, it may be very seriously doubted whether it did not go beyond the bounds prescribed by the statute. But as both sides admitted in open Court that there was no dispute about the title, the Court held that the possession of the defendant was the possession of the plaintiffs, and his refusal to deliver *changed* that possession into himself, and made him liable in this form of action. Perhaps under the *admitted facts* of that case, the decision was right, but it should not be quoted as a precedent to authorize the right of property to be tried on a proceeding of this character, nor to authorize a party who has never been in possession, to acquire possession by this means.

The evidence in this case having failed to show that the plaintiffs had been in the possession of the cotton in dispute, the possessory warrant should have been dismissed.

Judgment reversed.

N D. GRAY, *et al.* plaintiff in error, vs. HOWELL LAW-  
SON, for the use of MARY L. PRESTWOOD, defendant in  
error.

an action for a *tort*, the parties cannot, by a settlement between  
themselves, defeat any lien or claim which the attorney may have  
under a contract with his client, of which the opposite party had notice  
prior to the consummation of such a settlement. The mere fact that an  
attorney appears in the cause is not such notice. The party must have  
notice of the claim under a special contract to affect him.

where the attorney have a lien or claim by special contract, the Court, in  
case of *tort*, should not direct a verdict to be taken for the value of  
attorney's services; but should send the case to the jury upon the  
facts, as between plaintiff and defendant; and if a verdict be found  
in favor of the plaintiff, and the amount is sufficiently large, the attorney can be paid thereby, otherwise not.  
Whether the defendant in such a case shall pay the fees of the attorney  
for the plaintiff, must depend upon the recovery by the plaintiff in a  
case, and upon the merits of the cause sued on.

motion to enter Judgment for Attorney's Fees. Decided  
by Judge MILNER. Catoosa Superior Court. May Term,  
1867.

On the 23d of October, 1866, Mary L. Prestwood, by her  
friend, sued John D. Gray and wife, for maliciously  
suing her for larceny, and imprisoning her under a  
warrant therefor. The declaration was signed by A. T.  
Hackett, as her attorney.

The case was called for trial in May, 1867, when it was made  
known to the Court that the parties had independently of,  
without the knowledge of Hackett, settled the case, and  
both parties' attorneys proposed to have it entered settled.

Hackett resisted this and moved the Court to allow him  
to have a judgment against the defendants for his fee. The  
Court allowed an issue made up and submitted to the jury.  
Hackett examined J. A. W. Johnson, who testified: that  
his services as attorney in the case, were worth one hun-  
dred dollars, and closed.

The defendant's attorneys examined Hackett, who testified:  
that said services were worth at least \$25, and that defend-  
ant had no special notice from him "of the existence of his  
claim before the consummation of the settlement.



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*Gray, et al. vs. Lawson.*

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The Judge, understanding that the parties agreed that a verdict should be taken according to the opinion of the Court, directed the jury to find for the movant against said defendants, twenty-five dollars. This they did, and judgment was entered accordingly.

The defendants say the Judge erred generally, and ask a reversal by this Court.

ANDERSON & SHEPHERD, for plaintiffs in error.

A. T. HACKETT, for defendant in error.

WALKER, J.

1. There was no evidence that the defendants in the Court below had any notice of the attorney's lien, prior to the consummation of the settlement. It is not pretended that the settlement was made for the purpose of defeating the collection of the amount which might be due the attorney. Good faith on the part of defendants and their counsel is admitted. Parties cannot, by settlement between themselves, defeat the attorney of any lien or claim under contract with his client, of which the opposite party had notice prior to the consummation of such settlement. Rev. Code, Sec. 1980. An attorney may have a lien or claim under contract with his client in cases of *tort*, as in cases of contract; but it must exist by contract, and will affect the opposite party only where he has notice thereof, prior to the consummation of a settlement of the case. The mere fact that an attorney appears in the cause, is not such notice as is contemplated by the section quoted; the defendant should have notice of the claim of the attorney under a special contract with his client; otherwise, a settlement made in good faith with the opposite party, will be upheld. What is here said does not apply to liens of attorneys, except in a case like this, where a party in good faith settled a lawsuit without notice of any lien or claim of the attorney by contract with his client.

2. If the facts had been such as to show a valid lien under contract in favor of the attorney, the Court should have sent

case to trial upon the merits, as between plaintiff and defendant, and if the jury should find, in favor of the plaintiff, an amount sufficient to pay the attorney his claim, well good. The right of the plaintiff's attorney to recover fee from defendant, must be determined by the finding of jury. If the plaintiff have a valid cause of action, a recovery may be had; and if the jury, from the law and evidence, find there is due to the plaintiff an amount sufficient to satisfy the attorney's claim, a verdict and judgment should be rendered for the amount due him. Of course the settlement made with the party plaintiff is a protection against any claim he may have. It may appear on the trial that the plaintiff has no sufficient cause of action; or if his action be maintainable, he may be entitled to mere nominal damages, much less the claim of the attorney for his services; in either case the defendant should not be made to pay for the benefit of the attorney, more than the plaintiff had a right originally to recover. To allow the attorney to recover the amount of his fee, by contract with his client, from the opposite party, without showing that the opposite party was liable for so much, would be unjust. There was no evidence before the jury that the plaintiff had any real cause of action against the defendants, and it was error to permit a verdict to go against them without such evidence. It would have been error even if proper notice of the attorney's claim had been shown to the jury at the consummation of the settlement. The judgment reversed.

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Haslett vs. Harris.

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1. WM. M. HASLETT, plaintiff in error, vs. WM. T. HARRIS, defendant in error.
2. THE NEW HIGH SHOALS MANUFACTURING COMPANY, plaintiff in error, vs. BURRELL B. DYKES, defendant in error.

A party on the first day of April, 1863, received a bill of sale conveying to him with warranty of title, a negro slave then residing in Georgia, and who had been for three months previous thereto, and in consideration thereof, gave a promissory note for \$1,200, suit was brought on the note and a recovery had. *Held*, that the recovery was right. *Gobb vs. Battle*, 34 Ga. Rep., 483, in principle, covers this case.

1. By Judge WM. M. REESE. Elbert Superior Court. September Term, 1867.

2. By Judge HANSEL. Pulaski Superior Court. April Term, 1867.

1. On the first day of April, 1863, Harris sold to Haslett, a negro, gave him a bill of sale concluding "the soundness and title of said negro girl, I warrant and forever defend," and took in payment for her, Haslett's written obligation for twelve hundred dollars, payable "in good notes that will satisfy him," and due him one day after date.

Harris sued on this paper. Haslett plead the facts, that the girl was only worth \$240, that the contract was within the scaling ordinance, &c. Upon this issue the case was tried, resulting in a verdict for plaintiff for \$292.66, with interest and costs.

No complaint is made of this.

But Haslett also plead that, by virtue of the proclamation of the President of the United States, issued 1st January, 1863, said negro became free in Georgia, and was no longer subject matter for sale, that the obligation was solely in consideration of the negro as a slave, and therefore, the consideration had failed totally.

Upon demurrer filed to this plea, the Court sustained the

murrer, and rejected the evidence offered under this plea. and these rulings are brought up for review.

AMOS T. AKERMAN, for plaintiff in error.

E. P. EDWARDS, R. TOOMBS, for defendant in error.

On the 24th April, 1865, Dykes promised as follows, in writing: "to deliver on their order to Messrs. Hotchkiss & Menally, at some depot on the Macon & Brunswick Railroad, (500) twelve thousand five hundred pounds ginned cotton, the cotton to be packed or baled in such style as will be suited for transportation, and I agree to keep said cotton covered and sheltered and protected from stock—all other risk being assumed by said Hotchkiss & Menally."

On the 29th August, 1865, Hotchkiss & Menally transferred (in writing signed by them) said obligation as follows: "the within obligation and all pertaining thereto, is hereby transferred to Isaac Powell, President New High Shoals Manufacturing Company." Upon this plaintiff in error sued.

The pleas were general issue and failure, or want of consideration in this, that the consideration for the promise, were the negroes sold to Dykes as slaves, and warranted to be slaves, when in fact they were not slaves, but freemen.

At the trial, plaintiff read in evidence the obligation and transfer, proved a demand for the cotton, and refusal by Dykes to deliver it before action commenced and closed.

Defendant read in evidence the following bill of sale:

I have this day bargained, sold and conveyed to B. B. Edwards, nine slaves, viz: (naming them and giving their sex and ages) all of which are sound in body and mind, and the I will warrant and defend against the claim of my heirs, administrators, or any other claimant.

N. P. HOTCHKISS.

At this 24th day April, A. D., 1865, in presence of  
A. McGRUFF.

W. W. HARDY.

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*Haslett vs. Harris.*

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Defendant then proved that the federal army reached Macon, Ga., on or about the 20th April, 1865, and Hawkinsville, (Pulaski county, Ga.,) early in May, 1865 ; that he (defendant) was at the date of the obligation, ignorant of the fact that the slaves had been manumitted by the proclamation of the President of the United States ; and that said slaves were the consideration for the obligation, and that it was agreed at the time that the negroes were to be warranted as slaves, and to be slaves ; that after said army reached Macon, these negroes were valueless, because they could not be controlled.

The Court charged the jury that if they "were satisfied that the title to the slaves was the consideration of the note, and that title was warranted, and the slaves were conveyed subsequent to the proclamation of the President, (Lincoln) made the first day of January, 1863, declaring them manumitted, and after the occupation of Macon by the federal army, the consideration of the note had failed." The verdict was for the defendant.

The charge of the Court is assigned as error.

THOS. H. DAWSON, SAMUEL HALL, for plaintiff in error.

GEO. W. JORDAN, for defendant in error.

WALKER, J.

1. In *Cobb vs. Battle*, 34 Ga. Rep., 483, this Court say : "the recognition by the Convention of Georgia in November, 1865, of the abolition of slavery, thenceforth swept away at a blow, all laws in reference to negroes as slaves ; their freedom began then." While this case may not be precisely in point, yet the principle is the same, and that decision must control this case.

Judgment affirmed.

2. The effect of the decision in the case of *Haslett vs. Harris*, must be to reverse the judgment of the Court in the case of the *New High Shoals Manufacturing Company vs. Dykes*

## Southern Express Company vs. Newby.

m Pulaski county. We do not hold that negroes were freed Georgia on the first of January, 1863. Whether they were released by the proclamation of that date, in connection with the surrender of the State, and the occupation of it by the federal army, we find it unnecessary now to decide. We decide the case as made, and leave future questions to be decided as they may arise.  
Judgment reversed.

SOUTHERN EXPRESS COMPANY, plaintiff in error, vs. JOSEPH M. NEWBY, defendant in error.

An express company which pursues continuously, for any period of time, the business of transporting goods, packages, &c., is a common carrier; and in case of loss of the goods, &c., the presumption of law is against it; and no excuse will avail it unless the loss was occasioned by the act of God, or the public enemies of the State.  
The responsibility of the carrier commences with the delivery of the goods to himself or agent at the place where he is accustomed or agrees to receive them. And if the agent agrees to receive them at the depot where they are at the time, the liability as a common carrier begins.  
Here the Southern Express Company gave a receipt acknowledging the delivery of certain goods "to be forwarded," and expressing in the receipt that the company would not be liable for any loss from any cause whatever, except for fraud or gross negligence, and that where the value of the property was not specified in the receipt, the company would not be liable for a sum exceeding fifty dollars for each package: *Held*, that the receipt is evidence only of the reception of the goods by the company for the purposes therein specified, and is not evidence of an express contract: *Held*, also, that such an express contract as is contemplated by the Rev. Code, Sec. 2042, cannot be proved in this way; that the giving of the receipt and the acceptance of it by the shipper, do not relieve the company from the liability imposed by the law upon common carriers.  
The liability of the carrier commences when he receives the goods; and if they be lost he must show such facts as will relieve him from liability, or he will be held responsible.  
The Court is not bound to give in charge a general proposition, though the law, unless it be applicable to the facts of the case; and if a general charge be requested, he may modify or add to it so as to make it pertinent to the facts and the issue to be tried.

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Southern Express Company vs. Newby.

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Assumpsit, &c. Motion for new trial. Decided by Judge GIBSON. Richmond Superior Court. January Adjourned Term, 1867.

Newby brought an action in the usual form against the Southern Express Company, (a corporation) to recover the value of certain sugars and yarns, alleged to have been lost by the defendant while in its charge as a common carrier from Charlotte, North Carolina, to Richmond, Virginia. The contract for shipment was alleged to have been made in said Charlotte.

Before going into trial, the plaintiff proposed to amend his declaration, by charging that the contract for shipment was made with Shuter, President of the Company, at Augusta, Georgia, before the delivery of the goods at Charlotte; but this was not done. The testimony was as follows :

Plaintiff testified : that about the 17th of December, 1864, he told Shuter, who was then the acting President of the Company, at Augusta, Georgia, that he had said sugars and yarns at said Charlotte, and wished to turn them over to the Company to be forwarded ; Shuter agreed to send (and did send) a dispatch to the agent at Charlotte to receive them. The goods were worth more than is claimed for them ; they were then insured, but the insurance ran out in a few days, and was not renewed, because plaintiff considered them turned over to the Company. This arrangement was not made as a favor or accommodation to the plaintiff; he did not agree to take any risk. Plaintiff had a running account with the Company and did not pay the freight.

It was admitted that the said dispatch was as follows :

“ AUGUSTA, GA., Dec. 17th, 1864.

T. D. GILLESPIE, *Charlotte* : Receive from Captain Taliaferro, all sugars and bales in his charge : also, lot of sugar shipped to Greensboro. JAS. SHUTER.”

Said TALIAFERRO testified : that he had charge of the goods at Charlotte for plaintiff, and could not ship them by railroad; about said date plaintiff telegraphed him that the Company

## Southern Express Company vs. Newby.

uld take them ; Taliaferro told Gillespie that he had such telegram ; Gillespie told him of his aforesaid, and gave him three receipts for the goods. There was no agreement as limitation of liability, nothing was said about it. This was Taliaferro's first interview with Gillespie on the subject ; Gillespie had not before that refused to receive them from him. Plaintiff's attorneys then read in evidence the receipts : one three hogsheads, and one for twenty-one bales, consigned Robinson, Adams & Co., and the other for thirty barrels, consigned to G. V. Scott, Richmond, Virginia. Each item was in the following words, *mutatis mutandis* :

## SOUTHERN EXPRESS COMPANY,

CHARLOTTE, December 19th, 1864.

Received of J. N. Taliaferro, [stating packages] valued at [blank in dollars, and for which amount the charges are made by said Company, and [as above stated] which it is mutually agreed is to be forwarded by agency nearest or most convenient to destination only, and there delivered to other parties to complete the transportation. It is further agreed, and part of the consideration of this contract, that the Southern Express Company is not to be held liable or responsible for the property herein mentioned, for any loss or damage arising from the dangers of Roads, Ocean, Steam, or River Navigation, Leakage, Fire, or from cause whatever, except the same be proved to have occurred through fraud or gross negligence of its agents or servants, unless specially provided by it and so specified in this receipt, which insurance shall constitute the limit of the liability of the Southern Express Company in any case. And if the value of the property above described is not stated by shipper at the time of shipment, and specified in this receipt, the carrier hereof will not demand of the Southern Express Company a sum exceeding fifty dollars for the loss or detention of, or damage to each package herein receipted for ; nor shall the said Company be held responsible for the safety of said property, after its arrival at its place of destination.

All articles of Glass or Liquids will be taken at shipper's risk and the shipper agrees that the Company shall not be held responsible for any injury or loss by breakage, leakage, or otherwise.

For the Company,

C. A. OVERMAN.

Freight \$.....

Charges on Value \$.....

[War Risk Excepted.]



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 Southern Express Company *vs.* Newby.
 

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The following is on the margin of each receipt :

.....Insured by Southern Express Company. War  
risk, seizure or stoppage by civil or military authority, or force, excepted  
for ..... to .....

For the Company,  
.....

It was admitted that the goods did not reach Richmond.  
Plaintiff closed.

Defendant moved for a non-suit upon the ground that the  
suit was upon a general undertaking, and the receipts showed  
a special acceptance. The non-suit was refused.

The defendant's attorneys read the interrogatories of Gillespie, stating that he was agent at Charlotte, that there was no delivery of the goods to the Company; the goods were in the joint depot of the North Carolina and the Charlotte and South Carolina Railroads at Charlotte; the location of the goods were not changed, because there was no accommodation for them elsewhere, there was no actual delivery of them by removal or otherwise.

Taliaferro, who had been there about two weeks trying to forward the goods (which had come there by rail from the South) farther northward, applied to Gillespie, as agent, to forward them by express. Gillespie declined taking them because the Company's ware-houses were full, and the demand for Government transportation prevented the forwarding of any freight except on account of the Government. Several days after this, said dispatch was received; Taliaferro gave Gillespie a memorandum of the goods, and he ordered an express receipt issued without inserting any valuation for the goods. Taliaferro wished the value inserted, but Gillespie said the Company would assume no liability for the goods till they could take them in charge, that the Company's ware-houses were full, and, as he knew, private freight could not then be carried. After this explanation, Taliaferro accepted the receipt without valuation.

There was no other agreement as to liability than as aforesaid. Late in the night of the 7th of January, 1865, the joint-depot was burnt, and the goods, being yet in it, were destroyed.

they had not been removed for the Company had not room for them in its ware-houses, and because transportation could not be had for them.

The joint-depot was made of brick, metal-roofed, with iron supports, and had heavy batten doors, and no windows. Witness considered it a fire-proof building, whereas the Company's ware-house was a wooden building, put up during the war. Witness and A. H. Welsh, his freight agent, and C. T. Walker, also in the freight department, tried to have these, and the other goods in the Company's ware-house, transported over the railroad. By usage, the first received stood first for shipment, and others received before these were burnt with fire. It would have taken seventy-five or one hundred cars to have carried all the goods which had preference of shipment. Such was the demand for government transportation that no cars could not be had, and this caused the delay.

MICHAEL J. O'BRIEN testified substantially the same as to the Company's ware-house being of wood, being full for want of transportation, and even had there been no Governmental preference, it would have taken a month to have reached the goods in their order.

The record discloses that "the Revised Code of North Carolina (was) received in evidence," but what part of it was read, does not appear.

On rebuttal, Taliaferro testified that he had stated all that passed between him and Gillespie, that nothing was said as to limitation as to fire, nor any other limitation in the receipt, and that Gillespie, on the same day, received other goods, (as sugars from Brown.)

As to the charge of the Court, see the motion for new trial. The verdict was for the plaintiff for \$5,856.31 and costs.

The defendant's attorneys moved for a new trial, averring that the Court erred, 1st, in refusing the non-suit, and 2d, in saying "the verdict was against evidence," and because the Court erred in giving the following charge:

1st. Express Companies are common carriers, according to the principles laid down by common-law, and by the Code of Georgia.

2d. Common carriers are liable for all losses not occasioned by the act of God, or public enemies.

3d. A common carrier is an insurer for the delivery of goods entrusted to them, and liable for losses from all causes but the act of God or public enemies, and cannot limit its responsibility by notice or special acceptance.

4th. That in the absence of such express or special contract, no notice given in this case by the agent of the defendant at Charlotte, either by publication, or by entry on receipts given, or verbally, will relieve the defendant from liability.

5th. That even if anything that transpired between the agent of the plaintiff at Charlotte, and of the defendant there, amount to a limitation of liability, and an agreement that the defendant was not to be bound if the goods were destroyed by fire; yet, if a contract had been previously made by the plaintiff with the acting President in this State, without any limitation of liability, or notice to that effect given by such President, the acts or notices given by the Company's agent in Charlotte could not, and did not, set aside the contract made between the plaintiff and the President.

6th. That even if the jury should find that there was a contract in this case between the agents of the plaintiff and the defendant, which stipulated that the defendant should be exempted from loss by fire, or any notice given in the receipt which has the effect of such contract; still the *onus* of showing, not only that the cause of loss was within the terms of the exception, but also that there was no negligence, lies on the carrier.

7th. That in this case, though the jury should think that there is an entry on the receipt which exempts the Company from loss by fire, still, before any advantage can be had of this, the Company must show that there was no negligence on their part, nor on the part of any of their subordinate agents, who had this property in store, in the matter of the fire.

8th. That if the goods in this case were received by Gillespie, the agent, the place of storage then became a matter of discretion with him; and if he chose to let it remain upon storage in the railroad store-rooms, the servants and agents

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ere, for the purpose of such storage, became the servants and agents of the Company, and the proof that they were not negligent in the matter of this fire, is required of the defendant. Fourth, That the Court erred in refusing to charge, as requested by the defendants in writing :

1st. That if the jury believe, from the evidence, that it was agreed between the parties, that the defendant was to receive and keep the goods alleged to have been lost, for a reasonable time, until they could be sent forward on the railroad, the defendant, during that time, is to be considered and treated as a warehouse man, and liable as such ; and if the jury find from the evidence that the goods were lost or destroyed while they were so held, then the defendants are not liable, unless it is satisfactorily shown that the loss was the result of the negligence or improper conduct of the defendant.

2d. That if the jury believe from the evidence that the defendant, by its agents, executed the papers in evidence, and receipts, intending thereby to acknowledge the receipt of the goods, and to express and set forth the stipulations and conditions on which the defendant received the goods, and agreed to send them forward, and it was accepted by the agent of the plaintiff, then they become the express contract or evidence of the contract between the plaintiff and defendant, and both are bound by it.

3d. That if liable at all, the defendants are only liable, under the receipt, for fifty dollars on each package of goods.

4th. That, according to the evidence in this case, the defendants were not common carriers, but forwarding merchants.

5th. That the defendants asked in writing for the following charge : " That it is not necessary, to make or constitute a special contract, that both parties should sign the same ; but one party signs or executes it, and the other accepts it as such, then it is the contract of both parties, and both are bound by it ;" which charge the Court gave with the following qualification : " except in case of common carriers, when a special agreement only relieves them from extraordinary care and diligence," in which qualification the Court erred.

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Southern Express Company vs. Newby.

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The new trial was refused. The Judge certifies that he did charge, also, that the Company had the right to make a special contract as to terms and conditions on which to receive goods, and if such contract was made, it would control the parties, provided, however, that they could not thereby rid themselves of the obligation on them and their agents, to use ordinary care and diligence; and that the Company might act as bailee or factor, yet when they received goods to be forwarded, they were then liable as common carriers till they delivered the goods.

GOULD & DOUGHERTY, for plaintiff in error, made the following points:

1st. The acceptance of the receipt was a special contract as therein specified. *Dorr vs. N. J. St. Nav. Co.*, 1st Kernan, 491. *York Co. vs. Centr. R. R.*, 3 Wall, 107. *Weir vs. Adams Ex. Co.*, p. 2, (of a pamphlet produced by them.) *King vs. Woodbridge*, 34th Verm't, 57. *Van Toll vs. S. E. Railway Co.*, 104, Eng. C. L. R., 575. Opinion of Judge Campbell, of Tennessee, (in manuscript) in *Smith vs. Adams Ex. Co.* *N. J. Nav. Co. vs. Merchants' Bk.*, 6th Howard, (U. S.) 383. *Newstadt vs. Adams*, p. 1 in said pamphlet. *Catherine Parker, vs. W. B. Dinsmore, Prest., &c.*, *Ib.* 18. *Boorman vs. Adams Ex. Co.*, *Ib.* 24, (Supreme Ct. of Wisconsin.) And such acceptance set aside the carrier's common-law liability. *Boykins, Ex'r vs. Boykin*, 21st Ga. Repts., 526.

2d. The non-suit should have been granted. *Story on C.*, §13.

3d. That when such special acceptance is made, the shipper must prove want of ordinary care, &c. *Story*, 573, 5th B. & C., 322. *Newstadt vs. Adams Ex. Co.*, (*ante*) p. 7. *N. J. Nav. Co., vs. Mer. Bank*, (*ante*) 6th Howard, (U. S.) 384.

4th. That if defendant was liable at all, it was for only \$50 on each receipt. *Newstadt's case*, *ante*. *Boorman vs. Adams Ex. Co.*, *ante*. *Van Winkle vs. Adams Ex. Co.*, Sup'r Ct. of N. York, pamph. 23. *Meritz Meyer vs. Harnden's Ex. Co.*, pamph. 19. *Parker vs. Dinsmore*, *ante*, and the manuscript opinion, *ante*.

E. STARNES, for defendant in error, replied, that under the evidence, defendant was a common carrier, citing Story on B., 15, Code of Ga., §2039. Redfield on Railways, 232, 240. Ang. on Car., 75, 131, 134.

Nought excuses them but the act of God, or of public enemies. Story on B., 489, 490, '1, '2, Code of Ga., §2039. 1st Ev. and Bat. (N. C.) R., 273: and fire caused by human means is no excuse, Hollister vs. Nolen, 19th Wend., 238. Fish vs. Chapman & Ross, 2d Kelly, (Ga. R.) 357.

This liability commences on receipt of the goods. Story on B., §509, Code of Ga., §2043; Ang. on Car., §131; nor can it be varied by notice or special acceptance, Code of Ga., §2041, Fish vs. Chapman, *ante*, and Hollister vs. Nolen, *ante*; York Co. vs. C. R. R., 3 Wallace, (U. S.) R., 107, 112, 113. And this is so in North Carolina, Backhouse vs. Snead, 1st Murphy R., 173, and Revised Code of North Carolina, though this is immaterial, as the contract was made in Augusta, Ga.

The *onus* of showing, exercise of ordinary care, &c., in case of special contract, is on the carrier. Berry, *et al.* vs. Cooper, 11 Ga. R., 543.

WALKER, J.

An Express Company which pursues continuously, for a period of time, the business of transporting goods, packages, etc., is a common carrier; and in case of the loss of goods entrusted to it to be carried, the presumption of law is against it; and no excuse will avail it, unless the loss was occasioned by the act of God, or public enemies of the State. Code, Sec. 2040; Fish vs. Chapman, 2 Kelly's Rep., 357.

At common-law a carrier is in the nature of an insurer, and is bound to keep and carry goods entrusted to his care, and is liable for all losses, and in all events, except those caused by the act of God, and the king's enemies. This is the law, it is believed, in every State in the Union. Ch. Car., 34, and note.

The responsibility of the carrier commences with the

delivery of the goods either to himself or his agent, or at the place where he is accustomed or agrees to receive them. Rev. Code, Sec. 2044. In this case, the witnesses do not agree on the question of delivery, but that was a question for the decision of the jury, and they found in accordance with the weight of the evidence; in accordance with the receipt which acknowledged the reception of the goods. It is very clear that the agent of the Company agreed to receive the goods at the place where they were, in the depot, and the agent of the plaintiff ceased all control of them from the time of the giving of the receipt. There was sufficient evidence to warrant a finding that the goods had been delivered to the carrier, and when the liability commences by a delivery, it continues until the delivery of the goods at the point of destination. Code, 2044.

3. It is insisted that the receipt given in this case was evidence of such an express contract as is contemplated by the Code, Sec. 2043. Perhaps a more inviting field for legal disquisition than this, could not be found. The books, especially of late years, are filled with cases bearing upon this question. One who has leisure, and desires to explore this doctrine, can be gratified by examining Angel's and Chitty's works on Common Carriers; Story and Edwards on Bailments; the notes in Smith's leading cases to *Coggs vs. Bernard*, and the cases in 19 and 21 Wendell, and 2 Hill's N. Y. Reports.

Our Code has incorporated the rules of the common-law as expounded in Georgia, in *Fish vs. Chapman*, 2 Kelly, and with it we are satisfied. The learned annotator of Ch. on Car., p. 45, calls the opinion of Mr. Justice Nisbet, in *Fish vs. Chapman*, a "learned and thorough opinion," and quotes it almost entire as evidence of the common-law. "A common carrier cannot limit his legal liability by any notice given either by publication or by entry on receipts given, or tickets sold. He may make an express contract, and will then be governed thereby. Rev. Code, Sec. 2042. The carrier, then, cannot limit his liability by entry on receipts given, though he may make an express contract. This section intended to require the assent of the shipper to be given to any modification of the common-law contract of common carriers. The

ere acceptance by the shipper of a receipt with an entry on , was not intended to be an express contract, for the carrier cannot by this, limit his liability. A carrier may adopt reasonable rules and regulations for his own safety and the benefit of the public, (Rev. Code, Sec. 2043;) such as requiring the nature and value of the goods delivered to him, to be made known, and any fraudulent acts, sayings or concealments by his customers, will release him from liability. Rev. Code, Sec. 2054; Ang. on Car., Sec. 235-6. In 1 Bell's Commentaries, p. 382, he says: "There seems to be only one point to which, legitimately, notices of carriers could be admitted, viz: the regulation of the consideration for risk. Giving always the power of making an *express* contract, the effect of a mere notice ought justly to be restricted to this point; as to which alone it is competent for a carrier to refuse employment."

The entry on the receipts in this case, can be regarded in no other light than as notices given by the carrier, and though it be considered that they were brought home to the plaintiff, yet they are not of that character, and did not relate to such "regulations" as he had a right to adopt of his own mere will, and bind shippers thereby. They did not relate alone to "the consideration for risk," and there is no pretence that the carrier was not correctly informed as to the nature and value of the goods entrusted to him. There were no fraudulent acts, sayings or concealments by his customer. It was a simple effort on the part of the carrier, by an entry on a receipt, to limit his legal liability; nothing more, nothing less, and this the law says he cannot do. "For the law charges upon a person (the common carrier) thus entrusted to carry goods, against all events, but acts of God and enemies of the goods. For though the force be never so great, as if an irrepressible multitude of people should rob him, nevertheless, he is chargeable. And this is a political establishment, contrived by the policy of the law, for the safety of all persons, the necessity of whose affairs oblige them to trust these sort of persons, that they may be safe in their ways of dealing; for these carriers might have an opportunity of undoing all



persons that had any dealings with them." Per Holt, C. J. *Coggs vs. Bernard*, 2 Lord Raym. R., 918." "It appears from all the cases for one hundred years back, that there are events for which the carrier is liable, independent of his contract. By the nature of his contract, he is liable for all due care and diligence; and for any negligence, he is sueable on his contract. But there is a further degree of responsibility by the custom of the realm, that is, by the common law, a carrier is in the nature of an *insurer*." Per Lord Mansfield in *Howard vs. Pittard*, 1 T. R., 33, (1785.) "His responsibility is established with a view to public policy, to the reward which he receives, to his character as an insurer, and to the terms of his contract, express or implied." *Edwards on Bail*, p. 454. "The extent of the carrier's liability, does not depend on the terms of his contract; it is declared by law when he is charged as a carrier; it is on the ground of an obligation imposed upon him by law." *Ib.*, 466-7. His liability being fixed by law, he cannot lessen it at will by notice brought home to the opposite party, but he may make an express contract, and will then be governed thereby. Having become liable for the custody of the goods, it devolved on defendant to show such facts as will relieve it from this liability; otherwise, it will be held accountable. In *Berry vs. Cooper*, 28 Ga. R., 543, the Court below charged the jury, that if the cotton was received by the carrier under a contract exempting him from loss by fire, and the cotton was burnt, still the plaintiff was entitled to recover, unless there was no negligence on the part of the carrier, and the *onus* of proof of this fact lies on the carrier. This charge was excepted to, and this Court held that it was right; and the Court say: "To place the *onus* upon the plaintiff, would be to deny him all redress. \* \* Let the carrier then prove the loss and the manner of the loss. Policy, as well as the safety of all concerned, demands the establishment of this rule," p. 551. This is conclusive, and establishes the doctrine, that in cases of express contracts, the *onus* of proving the facts necessary to relieve the carrier from the common-law liability for the loss of goods entrusted to him as such, devolves upon him, and not upon the shipper.

4. The reception of the goods to be carried, makes the carrier liable for their safe custody and transportation within a reasonable time; and if he would relieve himself from liability, he should by proof, show such facts as may be necessary for that purpose. The charge requested by defendant's counsel as set out in the fifth ground of the motion for a new trial, is given with a qualification which the Court deemed necessary to make it applicable to the facts of the case. We understand there is no difference of opinion as to the correctness of the general proposition contained in the request. Standing alone, it was not applicable to the facts of the case, and the Court might very properly have simply declined to give it in charge.

5. The Court is not bound to give in charge a general proposition, though it be the law, unless it be applicable to the facts of the case. If such general charge be requested, he may either decline to give it, or he may modify or add to it so as to make it pertinent to the facts and the issue to be tried. While the request to charge, with the addition made thereto by the Judge, is not perhaps as happily expressed as it might be, still we think it sufficiently clear to be understood, and to contain a correct legal proposition. We understand the whole charge taken together, to mean that so far as a common carrier is concerned, the mere acceptance by a shipper of a receipt containing limitations of the carrier's liability, would not make an express contract between the parties, and thereby relieve the carrier from the extraordinary diligence imposed upon him by law. Thus understanding the charge of the Court below, we concur with him.

This is a hard case, and I have felt a strong desire to protect this Company against the payment of this claim, if I could do so on legal principles. If the jury had found that an express contract was made, by which the Company was not liable as common carriers, but only as ware-housemen, and only took charge of the goods as such, until such time as means of transportation could be procured, I think I would have been better satisfied with the verdict. But that was a question for them, and I cannot say that the verdict is deci-

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Terhune vs. Dever.

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dedly and strongly against the weight of evidence. This issue having been found against the defendant, I think, under the law, it is accountable for the goods burned ; and the whole Court being of that opinion, the judgment of the Court below is affirmed. See also the cases of Purcell and Barnes against the same defendant decided during this term.

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JOHN TERHUNE, plaintiff in error, vs. JAMES T. DEVER,  
defendant in error.

1. Misrepresentation of a material fact made by mistake and innocently, and acted on by the opposite party, constitutes legal fraud ; and the injured party may be relieved from the consequences of such misrepresentation.
2. No particular form of words is necessary to constitute a warranty.
3. To make an affirmation at the time of sale a warranty, it must appear to have been so intended, and not to have been a mere expression of opinion. An affirmation of the soundness of a horse made *bona fide* at the time of sale, does not necessarily amount to a warranty ; whether the words used amount to a warranty or not, is a question for the jury, under the rules of law applicable to the case.
4. Where a party warrants the soundness of a horse, he is liable on his warranty, if the horse be unsound, whether at the time the warranty was made he knew of the unsoundness or not.
5. Although the charge of the Court may not be technically accurate, yet if in effect he has submitted to the jury the legal rules which should control their finding, and it appears from the whole case that justice has been done, a new trial should not be granted.

Complaint on Note. Tried before Judge UNDERWOOD.  
Polk Superior Court. July Term, 1867.

Dever was sued by John Terhune upon a promissory note for \$150.00, made by him on the 19th of November, 1856, payable to Anna L. Terhune or bearer.

The defence was that the consideration of the note was a brood mare, bought as such by Dever from Dr. A. A. Terhune, as agent for the payee, and warranted to be sound, when, in fact, she was unsound and worthless.

The plaintiff read the note to the jury and closed.

The defendant testified in his own behalf that he went to Dr. A. A. Terhune, who acted as agent of payee, to the sale, saw the mare, but made no examination of her there. The agent told him the mare was sound, and, relying upon the agent's statement, he bought her, without taking her out of the sale; he does not believe the agent made any willful misrepresentation, he is a reliable and truthful man. He bought her for a brood mare, and this was known to the agent; he asked the agent if she were not a good brood mare, he did not hesitate to buy her. The next day defendant sent for the mare; when she came she was lame, and so continued until she died from such lameness. He told the agent of this lameness, but the agent said he thought she would soon recover, as she was seriously lame; he told the agent he did not wish to keep her if she were unsound, and the agent said "all right," but defendant did not offer to return her. Her left fore-foot was wasted; she was useless and expensive to defendant, and died three or four months after the purchase. The note was not given till several days after the purchase.

HARLES GARNER testified: that the mare was lame when she was brought to defendant, had a slight crack in the upper part of the left fore-hoof, and that foot was somewhat swollen, but it was not observable without close inspection. Witness examined it at the time and said she was unsound. In a few days thereafter he rode her to Rome and back, and she was lame that she got along with great difficulty. He, at the request of defendant, attended to her; she died in three or four months from that disease which he called ring-bone. She was not only worthless but expensive to defendant. The plaintiff, for himself, in rebuttal, was examined by interrogatories. He said the mare, the consideration of the note, at the time of the sale reasonably worth \$125.00; she was the property of Mrs. Anna L. Terhune, and her son, L. A. Terhune, sold her for his mother, to defendant. The witness did not hear the trade made, was not present, and believed the mare was perfectly sound. The defendant paid continuously from the date of the note till the suit was brought (in the beginning of 1858), to pay the note when

his cotton should be ready for market, and nothing was said to plaintiff about this unsoundness till suit brought.

The mare was grey, fifteen or sixteen hands high, strong, well-built, and nearly as large as any mare he ever saw; he bought her for his mother, as being ten years old, (though he thought her older,) kept her but two or three months, and saw no evidences of unsoundness in her. He was not the owner of the note; he had sued on it for his mother's benefit.

In rebuttal, defendant testified that he did not know plaintiff, nor did he know there was such a man, though he knew the family, and was occasionally at Mrs. Anna L. Terhune's house.

The evidence and argument concluded, plaintiff's attorneys requested the Court to charge, that no declarations by the agent Terhune that the mare was sound, would amount to a warranty of soundness, unless said Terhune knew the mare was unsound; also, that the implied warranty of the seller that the article sold is merchantable and reasonably suited to the use intended, (and in this case that the mare was reasonably suited for a brood mare), was not broken by lameness or general unsoundness, but is broken only by her not possessing the peculiar qualities of a brood mare, as that she is a breeder, has no habits inconsistent with her raising colts, etc.

The Court charged the jury that the note made a *prima facie* case for plaintiff, that if, at the time of the sale of said mare, Dr. Terhune, as the agent of Mrs. Anna L. Terhune, repeatedly stated to defendant that the mare was sound, and defendant relied upon such statements and made no special examination of the mare, that amounted to a warranty that she was sound, whether Dr. Terhune knew of any unsoundness or not, and that if she was not then sound, it was a breach of said warranty; and if said unsoundness rendered the mare of no value, plaintiff has no right to recover. And further, that the seller of an article always impliedly warrants that it is merchantable and reasonably suited to the use intended, and if the jury believe from the evidence that Terhune sold and Dever purchased the mare as a brood mare, and at the time of said sale said mare was lame or otherwise

unsound in such a way that she shortly afterwards died and was not fitted for a brood mare, such unsoundness was a breach of said implied warranty of her being reasonably fitted for the use intended.

The Court refused to charge as requested.

The verdict was for the defendant.

A new trial was moved for on the grounds that the Court erred in his said charge as to warranty, both as to express and implied warranty; that he erred in refusing to charge as requested, and because the verdict was contrary to law, to the evidence, etc.

The refusal of the new trial, upon the said grounds, is assigned for error.

E. N. BROYLES, for plaintiff in error.

CHISHOLM, WADDELL, and THOMPSON, for defendants in error.

WALKER, J.

Ought the Court to have granted a new trial in this case? If the testimony be credible, it is pretty clear that the purchaser received no valuable consideration for the mare. The mare purchased was not only worthless, but was a great expense. The agent of the seller said she was sound, and the defendant acted upon this representation and made the trade. Ought the plaintiff to receive pay for an article represented to be sound, and which was then unsound and worthless?

Revised Code, Sec. 3117, says: "Misrepresentation of a material fact, made willfully to deceive, or recklessly without knowledge, and acted on by the opposite party, or if made by mistake and innocently, and acted on by the opposite party, constitutes legal fraud." Fraud may exist from misrepresentation by either party, made with design to deceive, which does actually deceive the other party; and in the present case such misrepresentation voids the sale, though the defendant making it was not aware that his statement was false. Code, Sec. 2592.

2. No particular form of words is necessary to constitute a warranty. Ch. on Con., 453; 1 Par. on Con., 463; Sto. on Sales, Sec. 357. Every affirmation at the time of sale of personal chattels is a warranty, provided it appear in evidence to have been so intended. 3 Star. Ev., 1237-'8. The tendency of all the modern cases on warranty, is to enlarge the responsibility of the seller, to construe every affirmation by him to be a warranty, and frequently to imply a warranty on his part from acts and circumstances, whenever they were relied upon by the buyer. Sto. on Sales, Sec. 359.

3. To make an affirmation at the time of sale a warranty, it must appear to have been so intended, and not to have been a mere expression of opinion. An affirmation of the soundness of a horse, made *bona fide* at the time of sale, does not necessarily amount to a warranty; whether the words used amount to a warranty or not, is a question for the jury, under the rules of law applicable to the case. If, however, the seller make any misrepresentations, which are acted on by the opposite party, though done innocently, by mistake, it constitutes legal fraud, for which the seller is responsible. While such misrepresentations may not in law constitute an express warranty, yet, inasmuch as fraud by one party, accompanied with damage to the other, in all cases gives a right of action, (Rev. Code, Sec. 2906) it may be laid down as a general rule that all representations made by the seller, and acted on by the buyer, become in effect a warranty that the property is equal to the representations. Of course there is a difference between representations of facts and commendations, which are the mere expression of opinion, and so understood by the parties; for the latter the seller is not answerable, while he is for the former, if they are acted on by the purchaser.

4. In case of a warranty of the soundness of a horse, it is immaterial whether the warrantor knew of an unsoundness or not. In case of unsoundness, the warrantor is liable in either event. The warranty is given to protect the purchaser against unsoundness, and his right of action exists by contract, irrespective of any fraud on the part of the seller.

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5. We are inclined to think the Judge did not submit to the jury the rules applicable to the case with technical accuracy, yet he did so in effect; and as it appears from the whole case that justice has been done, a new trial should not be granted.

Judgment affirmed.

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UCY J. WHATLEY, *et al.*, plaintiffs in error, vs. ZACHARIAH SLATON, *et al.*, defendants in error.

[NOTE.—Judge HARRISS did not preside in this case.]

The Ordinance of the Convention of 1865, "to adjust the equities between parties to contracts," applies in terms to contracts and not to wills.

When a Bill in Equity is dismissed, it is out of Court, and no decree can then be rendered upon it.

The "instructions" given by the Court to the Executor in this case are proper, but they should have been embodied in a decree.

Bill for Direction, etc. Demurrer, etc. Decided by Judge MASON. Dougherty Superior Court. June Term, 1867.

JEREMIAH HILLSMAN, as Executor of SARAH ELY, filed a bill containing the following averments:

Sarah Ely died testate on the ——— day of ———, 1864. When she executed her will she was supposed to be *in extreme*. The will had been probated and Hillsman had qualified Executor. When she made the will, she was possessed of considerable land, in cultivation, stock thereon, negroes and other property, worth about \$147,840.00 estimated in Confederate money, which was then the currency in the State. After the war ended, (it having resulted "in the contest of the Confederate States, and in the emancipation of slaves holden in the Southern States,") and thereby the value of the estate was greatly reduced. The Executor has the perishable property and rented out the plantation for



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the present year, has sold all the other property, and the value of the real estate, after the payment of all the debts and expenses, will not exceed about ten thousand dollars.

The items of the will were as follows :

1st. Provides that her debts be paid as soon after her death as practicable.

2d. "I desire and direct that all of my property, both real and personal, (except one able-bodied negro fellow hereinafter disposed of,) shall be, as soon as practicable, sold, and the proceeds thereof distributed as hereinafter bequeathed and directed; and I direct my Executor, in the sale of my negro property, not to divide the families, but to settle families together.

3d. To my nephew, Burwell Green, I give and bequeath one negro man named Lige, of yellow complexion, and five hundred dollars in money.

4th. To my brother, Zachariah Slaton, I give and bequeath five thousand dollars in money.

5th. I give and bequeath to Robert N. Ely five hundred dollars in money.

6th. I give and bequeath to the children of Dr. Jeremiah Hillsman, now living, and seven in number, the sum of two thousand dollars each in money.

7th. I give and bequeath to Mrs. Susan Murrell an amount of money sufficient to buy her a comfortable house, suitable to her condition in life; the amount of money to be expended I leave to the discretion of my Executors.

8th. The balance of my property, after the payment of the specific legacies above enumerated, I desire and direct to be equally divided *per capita*, and not *per stirpes*, among my following named relatives, share and share alike: Lucy Ann Cothran and her living children, names not recollected, but believed to be five in number; Jared Pounds, and the living children of Isham Pounds, names not recollected, but believed to be four in number; and my crippled niece living in Mississippi, formerly Lucy Ann Raines, but since married, and her present name not known; and John Gamble, now living in Louisiana, and who married my niece Martha Green; and

Emma Haynes, daughter of Permelius Haynes. And I direct my Executors to make inquiries and find out these persons and notify them of their legacies.

9th. I do hereby nominate and appoint my friends Jeremiah Hillsman and John A. Davis the Executors to this my last will and testament, and hereby clothe them with full power to sell property either at public or private sale, as may be best to carry out this my will."

It was duly executed on the 3d day of November, 1864.

On the 15th day of April, 1865, the Executor paid Burwell Green \$5,000.00 in Confederate currency and delivered him Lige, and took his receipt in full of his specific legacy.

He has not paid any of the other specific legacies of money nor bought the house for Mrs. Murrill; he intended to apply one thousand dollars to such purchase, but because of the decreased value of the estate, he is in doubt what to do in this matter, and asks the direction of the Chancellor as to it.

The estate now consists of cash and claims considered good, over and above the payment of the debts and expenses of the administration, of about three thousand dollars and a plantation in the Second District of Lee county, consisting of about six hundred acres, now worth about six thousand dollars, and this is not sufficient to pay the specific bequests in good currency.

It is pretended by some of the parties, and particularly by the residuary legatees, that it was the intention of testator that all of said bequests should be paid in Confederate currency, then worth but little in comparison with specie, and that the specific bequests should be paid in present currency equal in amount to the value of such bequests in good money at the date of the will, and not otherwise.

On the other hand, Robert N. Ely and complainant's children claim that, whatever may have been testatrix's intention as to the other specific bequests, she did intend that their legacies should be paid in good money, for that on the 20th February, 1855, when the currency was at par, she made another will, (which was revoked by this last one,) in which she made the same bequests to them as in this one, and did not in the interim change her mind in this regard.

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The Executor feared that he would be embroiled in vexatious litigation, and might involve himself in personal liability by attempting to move in the matter, and to avoid this he prayed instructions and direction, and that all the parties named, by themselves or their representatives, should appear, and have all his accounts audited and all of said matters settled, and for general relief.

To this bill Lucy J. Whatley filed her answer.

She stated that she was the niece of testatrix, called in the will Lucy Ann Cothran; her maiden name was Pounds—it was changed to Coats, then to Cothran, and then to Whatley, by marriage. She has five living children, named \* \* \* all minors; she is their only surviving parent, and prays that Samuel D. Irvin, Esq., be appointed their guardian *ad litem*. She denied that the will contained any specific bequest except that to Burwell Green, (which last had been paid); the other persons supposed to be entitled to specific legacies, are not so entitled. It is manifest from the will that they should take but a small part of testatrix's property, and that 12-13ths or more should go to the residuary legatees, of whom she and her children constituted six-fourteenths.

She plead, in the answer, that under the will (if testatrix was competent to make a will), she intended that all the legatees named therein should be paid in Confederate money, which was at the date of the will the only currency of the country, and had been for three or four years before that, and there was no reasonable expectation at that time of a different currency; that all of the legacies are in their nature general, and should abate proportionally in case of a deficiency of assets; that her intention must be ascertained from the will and the surrounding circumstances; that estimating her estate at a large amount, she intended a small part only should go to the specific legatees, and the mass of it to the residuary legatees; Burwell Green being paid, Zachariah Slaton, Robt. N. Ely, and the children of Jeremiah Hillsman, should receive in good currency what their bequests in Confederate money was worth in good currency; that the loss by emancipation should be borne equally by all—that is, one-twentieth

should be charged to the specific legatees, and nineteen-twentieths to the residuary legatees, and this same rule of abatement should be applied to the legacy of Susan Murrill.

Robert N. Ely and Zachariah Slaton filed a demurrer, averring in substance that there was no ambiguity in the will, should be followed according to its terms, and for these reasons there is no equity in the bill.

During the argument the Court refused to hear the answer and plea filed in behalf of said residuary legatees, objection having been made to the hearing of them by the demurrants. After argument, the Court allowed the Executor his costs on account of said bill and litigation thereon, and dismissed the bill "on the following conditions and directions":

1st. That the Executor is hereby instructed, ordered and directed to sell the property of the testatrix, reduce the whole money, and then to pay off, *First*—the debts of testatrix and necessary expenses of the administration of said estate and the execution of said will. *Second*—That from the proceeds of the balance of the estate, thus ascertained, the Executor pay off the unpaid general or specific legacies contained in said will; that is to say, \$200.00 each to the children of Jeremiah Hillsman named in said will, \$5,000.00 to Zachariah Slaton, and provide a home for Mrs. Murrill as directed by the will, in the discretion of the Executor, and within the sense of the testatrix, (it being understood that no other general or specific legatee, Burwell Green, has been satisfied,) and that after the payment or satisfaction of said general legacies, if there be sufficient assets in the hands of the Executor for that purpose, and if any insufficiency, that in the same abate *pro rata*; that the balance then left in the hands of the Executor be divided and distributed to the residuary legatees equally, according to the instructions in said will.

Samuel D. Irvin, as solicitor for the residuary legatees, filed a bill of exceptions, assigning for error—

- 1st. The refusal to hear the answer and pleas aforesaid.
- 2d. Sustaining the demurrer.
- 3d. The giving of the directions and orders aforesaid.

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*Whatley, et al. vs Slaton, et al.*

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Counsel consented that the specific legatees should be made the defendants in error, (in lieu of the Executor, and that the case be considered fully,) so as to settle the matters between the two classes of legatees.

SAMUEL D. IRVIN, for plaintiffs in error.

LYON, DEGRAFFENREID & SHORTER, and ROBERT N. ELY, for defendants in error.

WALKER, J.

1. A careful examination of the ordinance of 1865, "to adjust the equities between parties to contracts made, but not executed," etc., satisfies us that it was not intended to include wills. The caption embraces three objects, all in reference to contracts, and each section applies to one of these objects. "Contracts" was the subject under consideration, and while possibly there are cases where the ordinance might well be applied to wills, we are satisfied such was not the intention. By no fair rule of interpretation can the language be enlarged so as to embrace wills.

2. The Court sustained the demurrer and dismissed the bill, and then proceeded to direct the Executor how to administer the estate. When the bill was dismissed there was no case in Court, and the Court had no authority to make a decree in a case which he had turned out of Court. In the very act of dismissing the bill, he proceeds to give the representative the instructions for which the bill was filed, thus showing that the bill was properly filed, and that the demurrer ought not to have been sustained and the bill dismissed.

3. We approve the instructions given to the Executor; the error into which the Court fell was in giving such instructions in a case which had just been dismissed, and consequently had no standing in Court. It had passed out of the Judge's jurisdiction. We reverse the judgment, and direct that the case be reinstated, and the "instructions" be embodied in a decree, so as to be the judgment of the Chancellor upon the facts and law of the case.

Judgment reversed.

JOSEPH R. HOLLIDAY, plaintiff in error, *vs.* R. M. MCPHERSON & Co., and HOGE, MILLS & Co., defendants in error.

This Court will not control the discretion of the Chancellor in continuing or dissolving injunctions, except where there may be an abuse of discretion.

Dissolution of Injunction. Decided by Judge COLLIER, *in chambers.* Fulton County. July, 1867.

On the 16th October, 1866, in Fulton Superior Court, R. M. McPherson & Co. obtained a judgment against Hoge, Mills & Co., for 1,009.65 principal, \$64.68 interest, and \$— costs. *Fi. fa.* was issued and levied, on 28th January, 1867, on a large lot of machinery, (specifying the articles) a large lot of flasks, a large lot of patterns of various kinds, and a lot of iron tools, as the property of the defendants, Hoge, Mills & Co., they having pointed it out to the deputy sheriff. The property was advertised for sale on the first Tuesday in April, 1867.

On the day of sale, Joseph R. Holliday filed a bill alleging, that on the first day of December, 1866, the Gate City Car Manufacturing and Machine Works, a body corporate, of said County and State, by their superintendent, James Hoge, executed and delivered to him, a mortgage upon all the machinery of every kind and description belonging to said corporation, to secure a promissory note of that date, and due three months after date, for \$4,000, which mortgage was duly recorded; the note was not paid, and on the 6th March, 1867, the mortgage was foreclosed, and the mortgage *fi. fa.* was levied on the same property (levied on by the common-law *fi. fa.* as the property of the corporation, and under it the property was to be sold on the first Tuesday in May, 1867; the members of the firm of Hoge, Mills & Co., are some of them, not all, members of said corporation, which was incorporated by the General Assembly of Georgia, at the session of 1855-6, and about that time the corporation organized and chased of Hoge, Mills & Co., all the property, or nearly all that was mortgaged to Holliday; the firm of Hoge, Mills

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& Co. is composed of James Hoge, John C. Hendrix, J. G. W. Mills and Edwin Payne, of Fulton county, George W. Lee, of DeKalb county, and James M. Austin and ——— Garrison, whose residences he did not know, and R. M. McPherson & Co. is composed of Rufus M. McPherson, of Arkansas, and J. H. Jeroulman, of Fulton county; that he has tried to induce McPherson & Co. not to sell said property, but they insist on doing so, which is contrary to equity, in that the said goods and chattels so mortgaged to him, if sold by the *fi. fa.* of R. M. McPherson & Co., may be so scattered abroad among different purchasers, as that it will be impossible, perhaps, for him again to gather them up, and if not impossible, at least very difficult and expensive.

The prayer was that defendants should answer the bill, and that the sale under R. M. McPherson & Co.'s *fi. fa.* should be enjoined.

The bill was verified by one of complainant's solicitors, who swore that the facts were true according to the best of his knowledge, information and belief.

The mortgage (made an exhibit to the bill) was in the usual form, reciting that "we, James Hoge, John C. Hendrix, James M. Austin, ——— Garrison, Frederick G. Stewart, Edwin Payne and J. G. W. Mills, operating under the style of "Gate City Foundry, Car Manufacturing and Machine Works," all of said county and State, for and in consideration, &c., \* \* \* \* \* and for the better securing the payment of a certain promissory note, said James Hoge, &c., (re-naming them) have this day made and delivered to Joseph R. Holliday, bearing date with these premises, and to become due three months after date thereof, whereby said James Hoge, &c., (re-naming them) promised to pay said Joseph R. Holliday \$4,000 for value received, have bargained, &c., "all the machinery of every description and kind whatever, belonging to the said James Hoge, &c., (re-naming them) now in the factory, situated on Marietta street, in the city of Atlanta, consisting in part of steam engines, lathes and planers, &c." To have and to hold, &c. And the said James Hoge, &c., (re-naming them) will warrant and defend the

title, &c., *provided*, that if said James Hoge, &c., (re-naming them) should pay the note, &c., this conveyance is to be void. In testimony, whereof, said James Hoge, &c., (re-naming them) have hereunto set their hands and seals, this the first day of December, 1866. It was signed "James Hoge, Superintendent Gate City Foundry, Car Manufacturing and Machine Works."

The bill was sanctioned and the sale enjoined.

On the 17th May, 1867, R. M. McPherson & Co., and Hoge, Mills & Co. answered the bill.

Hoge, Mills & Co. admitted the note and mortgage were made and delivered (to James M. Willis, as agent for complainant,) for a sum of money loaned to said Company by complainant, through his said agent, and the existence of the two *fi. fas.* and two levies, &c., as before described.

They denied, however, that the mortgage covered all the property levied on by McPherson & Co.'s *fi. fa.* They averred that said agent asked for no other mortgage than one on the machinery, and presented a mortgage agreeable to Holliday, which Mills copied (changing names, &c., to suit) and had signed and sealed; they averred that the term machinery does not include the flasks nor patterns, nor iron tools; that they were informed that the deputy sheriff made the levy on the mortgage *fi. fa.* by procuring Mr. Welborn, who was then staying in the office of complainant's solicitors, and was then, perhaps, (as he is now) their partner, to make a copy of the levy on R. M. McPherson & Co.'s *fi. fa.*, only changing it so as to fit the mortgage *fi. fa.*; that thus, by an honest mistake of Welborn and the deputy sheriff, the mortgage *fi. fa.* was levied on more than it covered.

They admitted that Hoge, Mills & Co. was composed of the persons as charged, and divers others, and that that firm procured the act of incorporation. They averred that the old Company and the corporation were the same, with these exceptions, to wit: Thos. Chandler, Hammond Marshall, Frederick G. Stewart and John S. Westbrooks, were members of the firm and corporation both, and that since the incorporation, Geo. W. Lee, Thos. Chandler, Hammond Marshall, John S. West-



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brooks and Frederick G. Stewart, have gone out, and C. P. Garrison has come in, and Wm. R. Phillips purchased and took transfers of Stewart's stock, and they considered him also a member of the corporation, that the corporation has no President, but its chief officer is James Hoge, known as Superintendent.

They denied that the corporation purchased said property from the firm, in the sense of paying for it; but, they said, the truth was, that the old firm procured the charter, certain parties went out and certain others came in as aforesaid, and they simply changed the books from Hoge, Mills & Co., to the corporate name, and the corporation went on to finish the business of the firm, assuming its liabilities.

Besides, they averred that said agent, before he took the mortgage, was distinctly told by said Hoge and said Mills, that said machinery, which they were mortgaging, was encumbered by two liens, to-wit: a *fi. fa.* in favor of R. M. McPherson & Co., for \$1,009, besides interest and costs, and a *fi. fa.* in favor of Lewis Spitzer & Co., for \$2,000, besides interest and costs, both obtained at October term, 1866, of Fulton Superior Court, and that these *fi. fas.* had a prior lien on said property, was well known to said agent before he took the mortgage.

They said that they did not believe McPherson & Co., or their attorneys, ever saw Holliday, but that Wm. R. Phillips, aforesaid, as they were informed and believed, did try to get said attorneys not to sell said property, and they would not desist; that the injunction stopped the sale of patterns, insured for \$5,000, and worth more than that, of tools worth \$2,000, and flasks worth \$1,500, which were not, nor were intended to be, covered by said mortgage, and do not belong to the machinery of the works, but are separate and distinct things, and that the machinery alone, at a low valuation, was worth \$6,000, that the whole establishment cost about \$35,000, and was insured for \$15,000, (including the patterns) all of which insurance was transferred to Holliday when the mortgage was delivered.

They stated that on the first Tuesday in May, 1867, when

said property was to have been sold by the mortgage *fi. fa.*, no sale was made, but as they were informed and believed, complainant sold his note, *fi. fa.* and insurance policies to said Phillips, and took therefor his note, due 1st December, 1867, with 8 per cent. interest thereon, and said deputy sheriff, at complainant's instance, had advertised a sale of said property for June sales, 1867; that Phillips was largely interested in the machinery and property, and with the corporation was running the same, and could sell it by said mortgage *fi. fa.*, or not sell as he thought proper, and that they feared he would so act as that their private property would be sold under the *fi. fa.* of McPherson & Co., (and the *fi. fa.* of Lewis Spitzer & Co., was then so levied on as the private property of Edwin Payne aforesaid.)

Jeroulman admitted his partnership with McPherson, stated that McPherson resided in Arkansas, and he in New York, that their *fi. fa.* was a just debt and unpaid, that he believed the foregoing answer was true, that he was informed and believed the deputy sheriff took no bond for the forthcoming of said property, although he left it with said corporation, and that if the same should be burnt, they might have to sue on the deputy sheriff's bond, or to resort to the private property of the members of the firm to collect their money. He further averred that only \$3,400 was loaned by complainant to Hoge, Mills & Co., and that all these facts were known to Phillips before his purchase aforesaid.

This answer was verified by "James Hoge, as Superintendent of said corporation," and by Jeroulman.

In July, 1867, defendants moved to dissolve the injunction, on the ground that the bill showed no sufficient equity to sustain the injunction, and if it did, the equity was sworn off by the answers.

Before the argument, Phillips, upon his motion, was made a party complainant in lieu of Holliday, and without prejudice as to the injunction, amended his bill by the following averments: He recited the fact that said injunction had been issued, averred that said property belonged to the corporation, that for two or three months past he had been the lessor of

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the property of the corporation, he was operating it as well as he could, that he had to pay off certain judgments against the corporation, (which it could not pay) to prevent the sale of the property, that his lease would expire in July, 1867, and he had purchased Holliday's *fi. fa.*, &c., to prevent a sale of the property, that this purchase was made at the special instance and request of Hoge, and some of the members of the corporation, that when he purchased he did not believe McPherson & Co. would insist on selling the property on their *fi. fa.*; the corporation was not disposed to prevent the sale thereunder; that the old firm was dissolved, and the members took stock in the corporation in payment for the property of the old firm; that he was informed and believed that some of the defendants represented to Holliday when he took the mortgage, that the property was worth \$30,000, sufficient to discharge the debts of the firm and corporation both, when, in fact, as he was informed, it was worth no more than sufficient to pay Holliday, and claimed that this property should be applied to the payment of this debt because it is a debt of the corporation, and the property belonged to the corporation. He prayed that the injunction should be held up.

At the hearing upon the said motion to dissolve, said complainant read an affidavit of said agent, Willis, stating that as such agent, he loaned a certain amount of money and took the mortgage, that Hoge & Mills represented to him that the property was worth from \$30,000 to \$40,000, and that it was unencumbered except by a judgment against Hoge, Mills & Co. for \$1,500, which was to be paid by the money he was lending, that they said that with a part of the money they would insure the property, which would make Holliday safe, and further, that the intention was that the mortgage should cover the tools, and if it did not, it was not as was verbally agreed to be made. Complainant also read in evidence the note which was signed in the same way the mortgage was, and endorsed by Hoge and by Mills and protested.

In support of the answer, defendants read an affidavit by

said Hendrix and Mills, that the facts stated in it were true. Defendants also read the McPherson & Co. *fa. fa.* and levy.

The Court dissolved the injunction, and complainant's solicitors say that in this he erred.

HAMMOND & MYNATT, for complainant.

A. W. HAMMOND & SON, for defendants in error.

WALKER, J.

1. There is no such abuse of the discretion of the chancellor in this case as to require the interposition of this Court. We have said again and again, that this Court will not control the discretion of the Court below, except in case of the abuse of its discretion. Where the rights of the parties may be finally settled by a trial, and no harm be done in the meantime, we are loath to control the Court in such interlocutory orders as may be deemed necessary pending the cause. Judgment affirmed.

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Moody vs. Ellerbie, Adm'r.

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JOHN R. MOODY, plaintiff in error, vs. JOHN ELLERBIE, administrator of STEPHEN ROYAL, deceased, defendant in error.

1. As a general rule, a Court of Equity will not interfere with the regular administration of an estate by the representative; and to authorize such interference, the facts must very clearly show there is a good reason for so doing.
2. If the indebtedness of one be the foundation of the credit given to the other party, and which credit cannot be enforced at law, this may sustain a set-off in Equity.
3. Where a judgment debtor of an estate which is solvent and owes no debts, purchases the share of a distributee of the estate in the debt, and there appears no reason why the representative of the estate should collect said share, except for the purpose of paying back the money to the debtor, equity will restrain the collection of such portion of the judgment, and order the amount credited on the judgment.

Set-off in Equity. Demurrer. Decided by Judge CLARKE. Chambers. Randolph County. October, 1867.

Moody bought of Stephen Royal land lot No. 337, 4th district of Calhoun county, giving him therefor his promissory notes for \$375.00 and \$700.00 respectively, dated 2d August, 1858, and due 1st January, 1859, and 1st January, 1860, respectively, and at the same time gave Royal a mortgage on the land to secure the payment of the notes.

Stephen Royal died; his son Daniel administered on his estate. He died, and then Ellerbie became the administrator. The notes were not paid, and Ellerbie, as administrator, foreclosed the mortgage, procuring, without opposition, a judgment for about \$1,664.00, principal and interest.

George Morgan married one of Stephen Royal's daughters, and was thereby entitled to one-third of Stephen Royal's estate. He transferred his interest in said judgment, in writing, to Hood, on 7th January, 1861; and afterwards, on 9th April, 1863, Hood, in writing, transferred said interest to Moody.

There are no debts against the estate, or if there be any there is sufficient other property to pay them, and therefore there is no necessity for the administrator to sell this land

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under the mortgage *fi. fa.* for the whole debt. It would work injury to Moody to sell his land for the whole debt, and in equity he is entitled to have the *fi. fa.* credited by the one-third due to him by this transfer.

Upon this state of facts, Moody, by his bill, prayed to set off this third against the said judgment.

Upon demurrer, the Court dismissed the bill. This is assigned as error.

H. FIELDER, for plaintiff in error.

WEST HARRIS, represented by A. HOOD, for defendant in error.

WALKER, J.

Equity jurisdiction is established and allowed for the protection and relief of parties, where, from any peculiar circumstances, the operation of the general rules of law would be deficient in protecting from anticipated wrong or relieving injuries done. Rev. Code, Sec. 3026. Is not the case here presented such as was contemplated by this section? Are there not peculiar circumstances which entitle this complainant to relief, and would not the operation of the general rules of law be deficient in protecting him from anticipated wrong? If so, then equity may entertain jurisdiction.

1. As a general rule, Chancery will not interfere with the regular administration of an estate, according to the statutes applicable thereto. To authorize such interference, the facts must show a very clear case; there must exist a good reason for controlling the administrator, who is proceeding according to law, in the manner of discharging his duties. Having assumed the execution of the trust, and being responsible for the faithful performance of his duties, in general he should be permitted to collect and pay out the assets of the estate according to the rules prescribed by law.

In the performance of his duties, however, it may occur that the rights of parties may require a departure from the ordinary routine; intervening equities, not reached by the

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law, may present themselves; or sets-off of an equitable nature may exist or arise, of which Equity may take jurisdiction. Rev. Code, Sec. 3084. "In cases of mutual credit, where there is knowledge on both sides of an existing debt due to one party and a credit by the other party, founded on and trusting to such debt as a means of payment, the law will so apply it." *Meriwether vs. Bird*, 9th Ga. R., 597; see *Ruckersville Bank vs. Hemphill*, 7th Ga. R., 413; *Jordan vs. Jordan*, 12th Ga. R., 87. If the indebtedness of one be the foundation of the credit given to the other party, and which credit cannot be enforced at law, this may sustain a set-off in Equity, *ib.*; 2 Sto. Eq. Ju. Sec. 1436, 1436 *a.* and notes.

3. Here the administrator has a judgment against the complainant; there are no debts against the estate, and the administrator, when he collects the money on the judgment, must pay it over to the heirs at law, three in number. The complainant is the assignee of one of the heirs at law, and as such entitled to one-third of the money raised on the judgment. Such being the case, why should not this one-third be credited on the judgment? Why should the administrator collect the money out of the complainant merely to pay it back to him again? No good reason was suggested in the argument, and none occurs to us. The complainant is the equitable owner of one-third of the judgment, and asks that his portion may be entered satisfied. If the allegations in the bill be true, this should be done, and the Court should have enjoined the collection of this one-third until a trial may be had, and if there appear no reason to the contrary, have the judgment to that extent satisfied. Should it appear on a trial that the rights of other parties would make a different decree proper, the Court will do what may be equitable under all the facts as they may then appear. Our judgment is based upon the allegations in the bill, which by the demurrer are admitted to be true.

Judgment reversed.

THE ATLANTA AND WEST POINT RAILROAD COMPANY,  
plaintiff in error, vs. LOVICK P. HODNETT, defendant in  
error.

1. By the statute a party is a competent witness; his credit is a question for the jury.
2. A public meeting of the citizens of Troup county was held for the purpose of procuring from the land owners the right of way for the Atlanta and West Point Railroad Company from LaGrange to West Point; agents of the company to procure such rights of way participated in said meeting; speeches were made by one of the agents, by Judge Hill, and others, in which the speakers represented that the Railroad Company would make all crossings and bridges needed by the land owners through whose land the road might pass, and make a turn-out or private depot for those who might need them. The agents of the company adopted these representations of the public speakers, and a land owner, acting on these representations, and understanding that he was to have all these advantages, made a deed without any pecuniary consideration, conveying to the Railroad Company the right of way through his land. The Railroad Company ran the road through his land a distance of two miles, and then refused to make any proper crossings, or bridges, or turn-outs, or depot, or in any way comply with the promises which were the consideration for making the deed. A bill was filed by the grantor to set aside the deed thus procured, on the ground that it was procured by fraud, and to recover damages for the wrongful appropriation of his property by the Railroad Company: *Held*, that it was admissible to show the refusals of the company to comply with the promises made by the agents, as a ground for cancelling the deed; and that the inducements held out in that meeting by the public speakers, under the facts of this case, were admissible for the same purpose.

Equity. Charge of the Court, etc. Tried before Judge  
VARNER. Troup Superior Court. May Term, 1867.

LOVICK P. HODNETT filed a bill in Equity against said  
company, in Troup county, the substance of which is as  
follows:

He owned certain lands in said county, (hereinafter de-  
scribed,) which he had for many years used as a farm and  
residence; said company, a body corporate organized to run  
and keep a railroad from Atlanta to West Point, through its  
many agents, appointed for that purpose, begged and impor-  
uned him to grant them the right of way for said road on



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*Atlanta and West Point Railroad Company vs. Hodnett.*

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and along said plantation, and represented to him that by the erection of said road great good would come to the public, and especially to the farmers of said county, and that such grant could never injure or damage his plantation or lands, but would greatly benefit them; by said agents, it declared to him and the public, in public meetings called for the purpose, that it would never extend the road through said county unless the right of way was given to it.

These representations were often repeated in public meetings, and private conversations, and letters purporting to be written by John P. King, the President of said company, were read, in which were such like representations roundly asserted to be true.

The company, knowing that he was but little acquainted with such works, and that he had never lived near a railroad, intending and seeking thereby to deceive and defraud him, also, by its agents, distinctly stated to him, among many other false things, that if he would give them said right of way on and along his said lands, the road should be so run as not to injure his plantation nor destroy any of the conveniences of locomotion and cultivation which he then enjoyed.

He then had good private roads from his houses and barns to his fields, which he had long enjoyed, and which were very valuable to him in traversing his plantation; by their agents, they promised not to destroy or injure these ways, but make good crossings for them over their railroad, that his conveniences and advantages in this regard should in no wise be impaired.

They said they would not divert the streams from their channels nor pond the water on his plantation; they promised to build and grant to him a turn-out on said lands, by which he would have an extra car or private depot, where he could, at will, carry his cotton and other marketable produce, and load the car and send his produce to market, and be thereby relieved of the necessity of keeping a market wagon, and have other valuable conveniences, and that they would give him a free ticket over said road. They also represented that such grant would be a public-spirited act, etc.

Believing these representations, and trusting to these promises, he was induced to grant the right of way without any compensation in money, when the same was worth two thousand dollars. He made the deed, but all its recitals as to consideration paid him, are false.

In 1853, the company ran its road over and through his plantation for about two miles in length, and in such a way as to completely divide his fields and cut off from his barns, etc., one hundred acres of his land which was in cultivation, and ran it directly across the road by which he had access to his fields, etc.; they threw up an embankment from nine to twelve feet high across said road, and made no crossing, and thus compelled him to travel around, a distance of five miles, with his wagons and hands in cultivating his lands and hauling in his produce, increasing his time and labor five-fold, (the distance by his old road being less than half a mile). By this a large part of his crop of 1853 rotted in his fields. By this the water was ponded, rendering portions of his land useless, and endangering the health of his negroes.

They have broken all their promises, though often having recognized them, though he has often applied to the company for redress, etc., and now pretend they are under no obligations to repair said mischief. He therefore charges that the deed was obtained by gross fraud.

He prayed that King should answer his bill, for damages for the injury already sustained and for the cancellation of the deed, or that the company be required to repair the injury done in damages, and specifically perform their contract.

The deed attached to his bill as an exhibit was in the usual form, dated the 4th of July, 1850, and so much of it as is necessary to understand this case, was in these words: Witnesseth, that said Lovick P. Hodnett, for and in consideration of their running their contemplated railroad on and along his land, as well as in consideration of five dollars, etc., \* \* \* hath given, granted, bargained and sold, and doth by these presents give, grant, bargain and sell unto the said Atlanta and LaGrange Railroad Company, and

their successors and assigns, the right of way over which to pass at all times, by themselves, directors, officers, agents, servants and hirelings, in any manner they may think proper, and particularly for the purpose of running, erecting and establishing a railroad with double track and turn-outs, or single track or turn-outs, as may at all times be at the discretion of said company, pursuant to a charter of incorporation granted said company 27th December, 1847, and to this end the limits of said right of way shall extend in width one hundred feet on each side from the centre of the roadway of said railroad when completed, and to extend in length through the whole tract of land owned and claimed by said Hodnett, lying and being in said county, adjoining the lands of Poythress, Henry Long and Shepherd G. Lane, whereon Hodnett now resides, running in such direction through said lands as said Atlanta and LaGrange Railroad Company by their agents, managers or workmen shall think best suited for the purpose of locating and establishing their said work, and connected with said right of way said company shall have the right to cut down and remove all such timbers or other growth on each side of said road as would by falling on or shading the same injure the rails or other parts of said road."

It also, in the *habendum* and *tenendum* clause, contained a provision that the deed should be void in case the road was not built on and over said lands. It was witnessed by Jesse McLendon and another.

To this bill, John P. King, President of the company, filed an answer, substantially as follows: He was ignorant of the truth of most of the charges in the bill. The road runs through the lands of complainant, and he gave the right of way, as did many others from similar inducement, without being begged for it, but as he was informed and believed, voluntarily, and for no other consideration than that expressed in the deed; that he supposes complainant to be as competent to judge of the effects of railroads running through the country or his lands as were his neighbors, with whom complainant co-operated in furnishing aid and inducements for building the road.

He did use arguments, and perhaps wrote letters, to impress the people of Troup county with the importance of railroad facilities to their section of country, but gave no opinion which he did not honestly believe, and made no promise which had not been honestly performed.

Complainant never made any complaint to him as President, or to the Board of Directors, as such, of any injury, nor requested any compliance with a violated contract, until the commencement of this suit; had he done so, he (King) could have, without regard to legal obligation, made every effort to render the exercise of their rights as little as possible inconvenient to him.

The extraordinary privileges and benefits claimed by complainant were too unreasonable to have been made or accepted without putting them in writing, and he did not believe they were promised by any authorized agent of the company; there is no fact known to him, nor does he believe any facts, putting this deed on different ground from other voluntary gifts of public-spirited citizens of Troup county. He is always been willing to give complainant the customary ticket for a limited number of years, and to make convenient and necessary crossings when not claimed at unreasonable places. He denied all fraud or deception and unauthorized injury to complainant by the company or its agents. He says to be discharged, and that complainant pay the costs.

Thus stood the pleadings in 1854. In 1857 it was agreed by the parties that Jesse McLendon should answer the bill, being one of the directors of the company.

He filed an answer, admitting that great efforts by speeches, arguments and conversations were made, to get the right of way *gratis*, that no money was paid to Hodnett for his grant, that the deed was as set forth, and was taken on the day of the public meeting and after it, that the road was built through Hodnett's land in 1853, and extended across his land perhaps over a mile but less than two miles in length, that by all it was represented that the price of lands would be increased and other benefits would flow to the owners of Troup county by building the road.

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He answered that the two engineers of the company, Wm. F. Fannin, himself and Orville A. Bull, were the only persons authorized to act for the company; that Hodnett may have been approached by these, and was by himself asked for the right of way, and persuaded to give it, and not only freely gave the same, but was an active advocate, trying to induce others to do so. But he did not believe any one told Holdnett that the road would not damage his plantation or lands or destroy his conveniences of locomotion and cultivation. It would be impossible to build a road without some injury to lands over which it passed, but that damage is usually counterbalanced by the increased value of the lands, which was in this instance twenty-five per cent.

He believed no authorized person ever stated that the road would not be built unless they got the right of way *gratis*: volunteer talkers may have said so. King's letters only amounted to an undertaking to get up the stock to complete the road, if the citizens of Troup would give the right of way. He knew nothing of any representation by defendant or its agents that Hodnett's roads should not be injured or destroyed, or that they would make crossings over the railroad. Such promises, except as to necessary crossings and stock-gaps, would have been foolish, and he did not believe they were made. The engineers and himself may have promised these necessary crossings and stock-gaps while they were building the road.

He did not believe any promise was made not to pond the water; at the date of the deed, though experimental lines had been run, no one knew where the road would be made.

He believed that the sole consideration for the deed from Hodnett, was to aid in the public and private good to flow from the road. He, as defendant's agent, took the deed, and had no recollection of any promise or assurance to Hodnett, at that time or before, that in consideration of his gift the company would grant him any privilege whatever; nothing was said about crossings, nor about disturbing the conveniences and privileges which Hodnett had before enjoyed, nor about building him a turn-out or granting him an extra car

or private depot, nor about a market wagon and team, nor about a free ticket. The facts were, that some time previous to the execution of the deed, at a public meeting of the citizens in LaGrange, Hodnett (and other land owners) had subscribed to a paper giving the right of way over their lands, and shortly afterwards he called on Hodnett for the deed, and he executed it without a word of objection or asking or receiving any promise or assurance at that time by any officer or agent of the company.

It is admitted that one field and part of two others of said farm are separated from the houses, etc., by the railroad; that the road crosses the old ways, and compelled Hodnett to go round to haul his crops home, but he could ford the creek and go to cultivate his crop without thus going round. About this want of a crossing, to save this circuitous route, Hodnett had complained, but demanded nothing but the crossing, (until this bill was filed,) so far as McLendon knew, and the company had promised nothing but this crossing, and that they would have made, but Hodnett would not have it at a proper place, but wished it where it would be very expensive, etc.

And these promises were made after the deed, and mostly after the road was built, and as a matter of favor. The crossing which they proposed to make would have saved this hauling around, and would have been almost as convenient at the place Hodnett wished it, but he would not have it less at the place designated by himself. It is admitted that they have not given him any of the things he says they promised, but all such promises are denied. All fraud and misrepresentation is denied. He insists for the company that the deed expresses the true contract, (except as to the pecuniary consideration,) and prays judgment for costs.

This case had been tried once, and a new trial ordered by the Supreme Court. (See 29th Ga. Rep., 466.)

On this new trial, after the bill and answers had been filed, complainant introduced Hiram Dennis, who testified as follows: I was in a public meeting of the citizens of this city in 1850, and Hodnett was there. I have forgotten

some things, but I recollect that Judge Hill spoke, and that McLendon was there. Hill spoke of the great advantages of railroads, and urged upon the citizens to give the right of way from LaGrange to West Point.

At this point complainant proposed to prove what Judge Hill said the company would do. Defendant objected. The Court ruled that the declarations of the public speakers would not be binding on the railroad company unless made by its authorized agents, or adopted or ratified by them, and heard the testimony, and defendant excepted.

Dennis then stated that McLendon and Fannin were the agents of the company for obtaining the right of way, and were both in the meeting when the speeches and declarations were made in regard to the right of way, and expressed no dissent, but proceeded to obtain signatures for the right of way for the road. McLendon was then acting for the road to get the right of way. Fannin spoke, and he and McLendon each had a list for subscriptions. McLendon and Fannin made no objections as to what had been said by Hill. They asked for subscriptions.

The speakers said the railroad would enhance the value of lands and save hauling, said the company would leave crossings and build bridges, so that we could get through fields as before.

He did not hear them say anything about private depots. They said they spoke in behalf of the company. Hill said he had some letters, or a letter, from Judge King. Hill said that the railroad would be of great advantage to the people of the country; he said nothing as to depots or turn-outs, but that the company would make crossings and bridges.

The witness then proceeded to show that the railroad divided Hodnett's farm and caused extra hauling; that after the road was built Douglass had put up a bridge which was worthless, etc., and gave his estimate of damages done to Hodnett by the road.

During this examination, the Court was requested to make complainant elect whether he would proceed for a rescission of the contract or its enforcement. The Judge did so, saying

that, in his opinion, this was a bill for a rescision of the contract on the ground of the alleged fraud in procuring the deed, and must be tried on that issue, and it was in that view alone the parol evidence was admissible.

The complainant was then introduced, and testified that he made the deed on the day of the meeting, and got no money for it; the citizens were called together for a railroad meeting, and speeches were made. McLendon and Fannin said the railroad would not be built unless the right of way was given; he did not recollect being there but once at a public railroad meeting before he made the deed; he was on the committee appointed by the meeting to get the right of way; from his understanding of the speakers, he was to have a turn-out or platform, as he pleased, and a free ticket for himself and family, without limit as to time.

He was asked the value of such ticket and turn-out. Defendant objected. The objection was overruled, and defendant excepted. He then stated that the ticket would be worth \$15.00 or \$20.00 per annum; that he was to have the privilege of a car at the turn-out at which to load, (he was to ship wood, etc.,) and the turn-out was worth fifty dollars per year.

While Douglass was laying the track, he said, "Let me get through to West Point, and I will come back and fix your crossing all right."

This was objected to, but the Court allowed it because Douglass was proved to have been defendants' engineer and agent.

He testified that he would not have signed the deed without said promises made by the speakers, and the deed was made soon after the meeting, and McLendon as agent of the company took the deed.

On cross-examination, he stated that all the sayings testified to as inducements to make the deed, were said by the speakers before the deed was executed, that nothing was said by the speakers as to him individually having a turn-out, the remarks were general; the speakers said those who gave the right of way would get privileges and get their property enhanced in value, and he thought they said such would get free tickets;



he understood Judge Hill to say that such would have a turn-out and car, that the citizens would have to load the car. Nothing was said about these things when he signed the deed. He also stated his damages, etc.; that he was on the committee to get right of way, and promised to each one who gave it a turn-out and car, and most of the land owners to West Point gave it.

Dr. R. A. T. RIDLEY testified how bad was the way and what was the distance around after the road was built, etc., and that he told Douglass of it, and he said something about a difficulty with Hodnett, and as soon as that was settled he would put up a bridge. This was allowed over the objection of defendant, and defendant excepted. He also stated that Judge Hill, in his speech, said something about free tickets, he thought; that Douglass built a poor bridge, and gave his opinion and reasons therefor as to the damage.

Complainant examined also Mr. Greenwood and John Dennis as to the value of the right of way, and the inconveniences and damages, and closed.

The defendant offered no testimony.

The Court charged the jury that if they should believe, from the evidence, that the deed from the plaintiff to the right of way through his land to defendant was procured by the false or fraudulent representations of defendant or its authorized agents before and at the time of its execution, and that the same would not have been executed by plaintiff to defendant but for such false and fraudulent representations made by defendant or its authorized agents, then they might find and decree that the deed be set aside and cancelled; but if they should believe from the evidence plaintiff voluntarily executed the deed to the right of way through his land, without any false or fraudulent representations made by the defendant or its authorized agents to induce him to do so, then they might find for the defendant; for in absence of fraud in the procurement of the deed, the deed itself was the highest evidence of the contract between the parties, and however hard it might operate upon the rights of plaintiff, he is bound by it, as Courts do not make contracts for parties.

Fraud must be proved and not presumed, without facts are proved from which fraud may be presumed. What facts (if any) have been established by the evidence from which fraud may be presumed in the procurement of the deed? Defendant's answer, responsive to the bill, is evidence for it, and when the answer denies the fraud, no decree can be made against such denial, unless controverted by two witnesses, or one witness and other corroborating circumstances. The complainant is made a competent witness by statute, and it is for the jury to say what credit they will give to his evidence.

In considering this branch of the case, such parts of defendants' answer as are not directly responsive to the allegations in the bill or explanatory thereof, are not evidence for defendant. If the jury should believe from the evidence that the deed should be set aside for fraud, then they may assess the damages proved to have been sustained by plaintiff for the use and occupation of his land by defendant, and may also find the former value of the right of way through plaintiff's land for defendants' road, and by their verdict confirm the defendants' right of way over the plaintiff's land, for it is the object of a Court of Equity, when it gets jurisdiction of a case, to do full and complete justice between the parties.

The jury set aside the deed, and found for damages \$2,116.00, and found \$1,000.00 for the right of way, and confirmed defendants' right to the same.

The defendant complains that the Court erred—

1st. In admitting the sayings of Judge Hill and the other speakers at the meeting in LaGrange.

2d. In admitting the sayings or promises of Douglass.

3d. In admitting evidence of the value of the free ticket and turn-out.

4th. In charging that complainant could be counted as a full witness to overturn the answer.

5th. In his charge as to proving fraud, in adding, "without facts are proved from which fraud may be presumed."

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6th. In charging that complainant could have a decree for the value of the right of way if they set the deed aside.

A. W. HAMMOND & SON, for plaintiff in error.

B. H. HILL and B. H. BIGHAM, for defendant in error.

WALKER, J.

While it is a general rule that a deed will not admit of parol stipulations being introduced into it, except in case of fraud, accident or mistake, (Logan *vs.* Bond, 13 Ga. R., 192,) yet the recital of the payment of the consideration may always be enquired into. Harwell *vs.* Fitts, 20 Ga. R., 723; Martin *vs.* Gordon, 24 Ga. R., 533. Fraud vitiates all contracts. Coffee *vs.* Newsom, 2 Kelly's Rep., 442. Upon the trial of this case, the Court, at the instance of plaintiff in error, forced the plaintiff below to proceed for a rescision of the contract, on the ground of fraud. The parol evidence admitted on the trial was for the purpose of showing that the deed for the right of way was obtained by fraud, and that complainant had sustained damages by the wrongful use of his land by the railroad company. The issue was fraud or no fraud, and that was a question for the jury. In determining that question, it was their duty to pass upon all the evidence introduced before them.

1. By the statute, the complainant is made a competent witness, his credit being for the jury. The Courts must consider and treat him as a witness, because the Legislature has said so. This is reason sufficient.

2. Whether the consideration moving complainant to make the deed was public spirit, and a desire to enhance the value of his property, and that of his neighbors by securing the construction of the railroad, or the other inducements of a turn-out, bridges, crossings, free tickets, etc., was a question for the jury. It is very certain no money was paid. Doubtless complainant expected to be benefitted personally, or he would not have made the deed. If, as the jury have found, and there is testimony to sustain the finding, the representations were made,

as he swears, to induce him to make the deed, and he, acting on these representations, did make it, would it not be a fraud on Hodnett to permit the company to hold on to the deed and not comply with the promises made as to the inducements thereto? The company took possession of his property and have used it for about fifteen years, greatly to his damage, and claim they have a right to do so, notwithstanding the jury have found that the deed was procured by fraud.

It is insisted, however, that the evidence proving that fraud should not have been admitted. The spirit of our legislation is not favorable to the exclusion of testimony. The course of legislation on this subject is in favor of opening all the avenues which lead to truth, and admit light from every possible source, so as to enable the jury by their verdict indeed to speak the truth of the transaction. Take the facts of this case. A public meeting was called for the purpose of procuring the right of way; the agents of the railroad company appointed for the purpose of getting up rights of way, were in that meeting; one of them made a speech; Judge Hill, a man of great influence in the community, made a speech and read letters from Judge King, the President of the company; the agents of the company proceeded in the meeting to obtain signatures for the right of way, each having a list of subscriptions, making no objections to the promises of Judge Hill, but went on the same day and took the deed from complainant, with a full knowledge of the promises made by Judge Hill, and were the inducements which caused the complainant to make the deed, and then say that these representations are not competent evidence! We do not so understand the rules of equity. The representations were made by those acting in behalf of the company, they caused the complainant to make the deed, the company received the deed and enjoyed the benefits accruing under it, and insist that nothing shall be paid for it, notwithstanding the agents of the company heard the promises made to the land holders, and knew that the deed was made on the faith of these representations. Under the circumstances, the speeches made in that meeting, and the inducements there held out to the people, were made

in effect by the agents of the company, for they were made in their presence, for the advancement of their undertaking ; they were taking subscriptions and deeds for right of way ; and thus in all the length and breadth of representations made by Judge Hill and others in the meeting, adopted and ratified them as the representations of the agents themselves. The company having thus induced the complainant to convey the right of way, should have complied with the promises made ; or if the agents had no authority to bind the company, as they proposed to do, then the company should have repudiated the action of its agents, and returned to the complainant the deed which he had made. Instead of doing this, however, they hold on to the deed, make the road, stop up complainant's passway to his farm, causing him to travel five miles, instead of one, to get to his fields, pond up the water, make no bridge or crossing, or in fact do anything which they promised. Such conduct showed a disregard of the rights of the citizen, and ought to be visited with pretty heavy penalties. The jury, under the facts, gave a small verdict in favor of complainant, and the defendant should be well satisfied that it is not considerably larger. I think the testimony would have well warranted a much larger verdict. One has no right to appropriate the land of another without his consent, and without compensation. When the company accepted the deed and took the complainant's land, it should have paid him for it in the manner promised by its agents, or surrendered up to him the land obtained from him by this fraud. Where the principal by subsequent approbation adopts the agent's act, the act then becomes that of the principal, and this approbation will be inferred whenever the principal avails himself of any advantages to be derived from the transaction. Hov. on Frauds, p. 145. In equity a corporation may be bound by a contract made on their behalf before they were fully constituted a corporate body, *if they have had the benefit of it as a corporation* ; thus an agreement made by the projectors of a railway company, on behalf of the projected company, was held to bind the corporation, they having enjoyed the benefits of it. Grant on Corp., p. 294, citing

Edwards *vs.* Grand J. R. R. Co., 7 Sim., 337 ; S. C. 1 My., &c., 650.

But does a case so plain need any authority to sustain it ? The railroad company have a deed which the jury have found was procured by fraud. The company do not pretend that they ever paid a cent for it, except the locating of the road on the complainant's property. It is not right that the company should keep the property and not pay for it. They refuse to pay as they contracted, then the jury did right to set aside the deed and award damages to the plaintiff for the wrongful use of his property.

We approve of the direction given by the Court in relation to the right of way. The road needs the right of way, and as equity does complete justice, it was proper that the whole dispute should be settled by one decree ; and therefore the assessment by the jury of the damages for the right of way was right and proper. Equity having obtained jurisdiction, very properly retained it and settled the whole matter between the parties, so that there should be an end of litigation in relation to this transaction.

Judgment affirmed.



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1. Alimony is an allowance out of the husband's estate for the *support* of the wife when living separately from him. When the verdict of the jury was in favor of a divorce, a *vinculo matrimonii* between the parties, and they further found for the plaintiff twelve thousand dollars: *Held*, that the legal effect of the verdict, under the Code, is to vest that sum in her as permanent alimony for her *support* and *maintenance* during her life only, according to her rank and condition in life. *Odom vs. Odom*..... 286

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2. After a verdict has been received and recorded, and the jury dispersed, it cannot be amended in matter of substance, either by what the jurors say they intended to find, or otherwise. *Mullins vs. Christopher*..... 584
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### APPEALS.

1. Upon a petition to establish a copy of a lost promissory note, and issue joined as to the making of the

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2. A defendant at common law, against whom a judgment was rendered, and also against his surety on bond given to dissolve a garnishment, entered an appeal, giving as his sole security the same person who signed as his security on the bond to dissolve the garnishment, and against whom judgment had already been obtained. On motion, made at the trial term, on the appeal, the Court dismissed the appeal, holding that no security had been given, and none could then be given: *Held*, that the decision was right. *The Eufaula Home Ins. Co. vs. Plant & Cubbedge*..... 623

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### ATTACHMENT.

- . The allegation in an affidavit that "the said Kennon & Klink are removing their property, to be removed beyond the limits of this State, and that John F. Klink is absconding," is a substantial compliance with our attachment laws, which are now to be *liberally* construed. *Kennon & Klink vs. Evans, Gardner & Co.* ..... 89
- . That the affidavit contains two grounds on which the attachment issues, instead of one, is not a good objection to the attachment. *Ibid.*
- . Attachments, though not directed to special bailiffs of County-Courts, by name, when served by them, returnable to the Superior Courts, will be sustained as legal. *J. M. & R. W. Wade & Co. vs. Stout*..... 95
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- . An Executor *de son tort*, who is removing the assets of the deceased out of the county, is liable to be attached and the assets levied on. *Ib.*

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3. In some cases the punishment of a party for a contempt is a remedial proceeding, to which the opposite party is entitled, though it may not be necessary for the vindication of the authority of the Court. In such a case if the Court below fail to give the party his rights, this Court will correct the error, and grant the party that relief to which he is entitled. *Ib.*
4. When a party consents to the violation of an injunction granted at his instance, and takes upon himself the management of the case, he cannot subsequently have the opposite party punished for such violation. A Court of Equity will not lend its punitive powers to one party, to coerce the opposite party into the making of new stipulations to which he had never agreed; nor, under pretence of punishing for breach of an injunction, attempt to enforce a contract made subsequent to its sanction. Equity will enforce the rights of parties, and those who invoke its aid should not by contract render nugatory its processes. *Ib.*

## ATTORNEYS.

1. When the leading or controlling counsel, especially if he theretofore conducted the case on trial, (although his name does not appear on the Judge's docket, and notwithstanding he was not directly employed by the party whom he represented,) is absent by leave of the Court, the case should not be tried without the consent of the suitor. *Summerlin vs. Dent et al*..... 54
2. A judgment regularly entered up, upon an acknowledgment of service and confession of judgment by an attorney at law, is not void, but only voidable, and that upon clear and decisive proof that such attorney at law acted without any authority in the premises for the party (whom) he represented. *Dobbins vs. Dupree*, 108
3. No warrant of attorney being required by the laws of this State or the practice of its Courts, to entitle an attorney at law to appear for a party litigant, the strong presumption from his appearance is that he was authorized. *Ibid.*

4. When at a regular term of the Superior Court, held in the month of May, the Court, not being able to get through with the business on the dockets, adjourned the Court over to the third Monday in August thereafter in due form of law: *Held*, that parties and their attorneys having business in that Court, were bound, at their peril, to take notice of the meeting and adjournments thereof, and that this Court will not control the discretion of the Court below in refusing to reinstate a case dismissed for want of prosecution at the adjourned term of the Court, upon the statement of the plaintiffs' attorney that he had no knowledge of such adjourned term of the Court. *Rawson vs. Powell*..... 255
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6. If an attorney have a lien by special contract, the Court, in a case of *tort*, should not direct a verdict to be taken for the value of the attorney's services, but should send the case to the jury upon the merits, as between plaintiff and defendant, and if the verdict be sufficiently large, the attorney can be paid thereby, otherwise not. Whether the defendant in such a case shall pay the fees of an attorney for the plaintiff, must depend upon the recovery by the plaintiff in the trial upon the merits of the cause sued on. *Ib.*

# AUTRE FOIS ACQUIT, Etc.

See *Criminal Law*, 10, 11, 12, 13.

## BAIL.

- . A Justice, before issuing an order for bail in an action for slander, need not hear evidence *pro* and *con*, but should so far examine the pleadings and other matters connected with the suit, as to enable him to fix the amount of bail. *Newton and McCullough vs. Bailey*.. 180
- . The Court, on the trial of *scire facias* against the bail, cannot enquire whether the amount of the bond was onerous. *Ibid.*

3. The Court, during the process of the suit for slander, could reduce the amount of bail upon defendant's application. *Ibid.*
4. Though the bond be not technically formal, if the recitals in it sufficiently show that it was taken as the bail bond in that case, the security can take nothing by this informality. *Ibid.*
5. To fix bail, the *ca. sa.* may be returned before the next term after it was issued. *Ibid.*
6. Where a bail-bond was taken by the Sheriff, in a civil suit, payable to the plaintiff, conditioned that if the principal defendant shall well and truly pay and satisfy the condemnation of the Court, or render his body to prison in execution of the same, in terms of the law, in such cases made and provided, and upon failure thereof H. W. A., his security, shall do it for him : *Held*, that such a bail-bond was good and valid under the laws of this State. *Scott vs. Russell & Allen*..... 494

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CAVEAT. See *Wills*, 1, 3.

### CERTIORARI.

1. *Certiorari* from a decision of a County-Judge, must be sued out within ten days from the decision, and not afterwards, that being the time prescribed therefor in the act organizing the County-Courts. *Robin vs. Nobles & Mitchell*..... 271
2. A substantial compliance with section 3967 of the Code, requiring written notice of the sanction of a writ of *certiorari*, and the time and place of hearing, is sufficient. *Milam vs. Sproull*..... 393
3. The object of giving the notice is to enable the party notified to take steps necessary for his defence. *Ibid.*
4. *Ex parte* affidavits, taken subsequent to the granting of a *certiorari*, are inadmissible upon the hearing of the case before the Superior Court. *Ibid.*
5. When a *certiorari* is applied for under the provisions of the Code which does not require the sanction of a Judge, a notice to the adverse party that a petition for

a writ of *certiorari* has been *filed* in the Clerk's office of the Superior Court, for the removal of the case from a Justice's Court to the Superior Court, will be sufficient. *Price vs. Munroe*..... 523

CESTUI QUE TRUST. See *Mortgage*, 6.

CHANCERY. See *Equity*.

### CHARGE OF THE COURT.

1. A charge unauthorized by the evidence is good ground for a new trial. *Wall vs. McOrary*..... 56
2. Where a defendant is indicted and put upon his trial for the crime of murder, it is the duty of the Court to give in charge to the jury the law defining that offence; and, if the evidence shall authorize it, but not otherwise, also to give in charge to the jury the law defining the inferior grades of homicide less than murder, as declared by the Code of this State. *Washington vs. The State*..... 222
3. When the defendant is indicted as the actor, or *absolute* perpetrator of the crime of murder under the Code, it is error in the Court to charge the jury, that they can find him guilty as principal in the second degree; but on the trial of a defendant so indicted, if the evidence shall authorize it, the Court may charge the jury that if they believe from the evidence that it was the intention of the parties engaged in a common difficulty, to do an unlawful act, and the defendant in the prosecution of that intention committed the homicide upon the deceased; or if they should believe from the evidence that the homicide was committed upon the deceased by either of the parties engaged in the prosecution of that common intention, then they might find him guilty. *Ibid.*

When the Court charged the jury on the trial of a defendant for having and carrying about his person a concealed pistol, "that if the prisoner *had a pistol*, and it was in Dr. Paris' during the morning, he was guilty, and they must so find him": *Held*, that this charge of the Court was error. *Washington vs. The State*..... 242

A charge not warranted by the facts should not be given to the jury. *Lewis, Sup't, vs. Whidbee*..... 371



6. C. & B. drew a special draft in favor of M. B., on C. & G., "against 172 bales of cotton, the title of which is conveyed to M. B., and is consigned to you, (C. & G.,) subject to the payment of this draft." C. & G. accepted the draft. Upon a suit by the payee, against the drawers, the Court charged the jury, that "under this contract, the plaintiff had a right to take control of the cotton consigned to C. & G., and take it out of their possession": *Held*, that this charge was wrong. *Calhoun & Beddingfield vs. The Manufacturers' Bank of Macon*..... 410
7. When the Court charged the jury upon the trial of an issue as to the truth of plaintiff's affidavit in suing out an attachment, "that if they believed from the testimony that the defendants were not about to remove beyond the limits of the county on the 14th day of December, 1866, the day on which said attachment was sued out, then they must find the issue in favor of the defendants": *Held*, that although the charge of the Court was too *stringent* in confining the enquiry of the jury to the *precise day* on which the attachment was sued out, yet, the verdict being right under the evidence contained in the record, a new trial will not be granted for that error in the charge of the Court. *Louis Stix & Co. vs. S. Pump & Co*..... 526
8. The Court is not bound to give in charge a general proposition, though it be the law, unless it be applicable to the facts of the case; and if such general charge be requested, he may modify or add to it so as to make it pertinent to the facts and the issues to be tried. *Southern Express Company vs. Newby*..... 635
9. Although the charge of the Court may not be technically accurate, yet if in effect he has submitted to the jury the legal rules which should control their finding, and it appears from the whole case that justice has been done, a new trial should not be granted. *Terhune vs. Dever*..... 648

### COMMON CARRIERS.

1. A common carrier, according to the laws of this State, cannot limit his legal liability as such, imposed upon him by that law, by any notice given either by publication or by entry on receipts given for the goods or tickets sold; but he may make an express contract with the shipper of the goods, which may be proved

outside of the receipt given therefor, and will then be governed thereby. *The Southern Express Company vs. Barnes, Trustee*..... 532

2. An Express Company which pursues continuously, for any period of time, the business of transporting goods, packages, etc., is a common carrier; and in case of the loss of the goods, etc., the presumption of law is against it, and no excuse will avail it unless the loss was occasioned by the act of God or the public enemies of the State. *Southern Express Co. vs. Newby*.. 635

3. The responsibility of the carrier commences with the delivery of the goods to himself or agent at the place where he is accustomed or agrees to receive them. And if the agent agrees to receive them at the depot, where they are at the time, the liability as a common carrier begins. *Ibid.*

4. When the Southern Express Company gave a receipt, acknowledging the delivery of certain goods "to be forwarded," and expressing in the receipt that the company would not be liable for any loss from any cause whatever, except for fraud or gross negligence, and that when the value of the property was not specified in the receipt, the company would not be liable for a sum exceeding fifty dollars for each package: *Held*, that the receipt is evidence only of the reception of the goods by the company for the purposes therein specified, and is not evidence of an express contract: *Held*, also, that such an express contract as is contemplated by the Revised Code, Sec. 2042, cannot be proved in this way; and the giving of the receipt and the acceptance of it by the shipper, do not relieve the company from the liability imposed by the law upon common carriers. *Ibid.*

The liability of the carrier commences when he receives the goods; and if they be lost, he must show such facts as will relieve him from liability, or he will be held responsible. *Ibid.*

CONCEALED WEAPONS. See *Criminal Law*, 6, 7.

#### CONDITION PRECEDENT.

Suit was brought on a policy of insurance obligating the insurance company to pay a certain sum "within sixty days after due notice and proof of the death of" the assured: *Held*, that allegation and proof of such

- notice and death are conditions precedent to a recovery on such policy. *Jackson & Jackson, Executors, vs. The Southern Mutual Life Insurance Company*..... 429
2. When a bond of indemnity is given against the payment of money due on the outstanding debts of a mercantile firm, the plaintiff must show some loss or damage sustained by the actual payment of the money due upon such debts, or that which the law considers equivalent to an actual payment thereof, in order to constitute a *breach* of the bond. The existence of a *mere legal* liability to pay such debts is not sufficient. *Harvey vs. Daniel*..... 562

### CONDONATION.

1. Condonation is a conditional forgiveness of all antecedent guilt. After a reconciliation, fresh acts of cruelty will revive acts of cruelty and also of adultery. Condonation is not so readily presumed against the wife as the husband. Knowledge of the guilt of the husband, and forgiveness by the wife, are not legally to be presumed, but must be clearly and distinctly proved, in order to bar the action. *Odom vs. Odom*..... 286

### CONFEDERATE CURRENCY, Etc.

See *Ordinance of 1865*.

### CONFESSION OF JUDGMENT.

See *Attorneys*, 2, 3, 4.

### CONSENT. See Waiver.

### CONSTITUTIONAL LAW.

See *Retroactive Legislation*.

### CONSTRUCTION OF CONTRACTS.

See *Contracts*.

### CONSTRUCTION OF STATUTES.

See *Retroactive Legislation and Attachments*.

### CONTEMPTS.

1. The action of the Superior Courts in punishing a party for a contempt, will not be controlled, except they abuse their discretion. *Howard vs. Durand*..... 346

2. In some cases, the punishment of a party for a contempt is a remedial proceeding, to which the opposite party is entitled, though it may not be necessary for the vindication of the authority of the Court. *Ibid.*
3. In such a case, if the Court below fail to give the party his rights, this Court will correct the error, and grant the party that relief to which he is entitled. *Ibid.*
4. A Court of Equity will not lend its punitive powers to one party, to coerce the opposite party into the making of new stipulations to which he had never agreed; nor under pretence of punishing for breach of an injunction, attempt to enforce a contract made subsequent to its sanction. *Ibid.*

# CONTINUANCES.

1. When the leading or controlling counsel, especially if he theretofore conducted the case on trial, (although his name does not appear on the Judge's docket, and notwithstanding he was not directly employed by the party whom he represented,) is absent by leave of the Court, the case should not be tried without the consent of the suitor. *Summerlin vs. Dent et al.*..... 54
2. This Court will not control the discretion of the Court below in refusing to continue a case, when the party applying therefor fails to state *any material fact* which he expects to prove by the witness whose evidence he seeks to obtain, applicable to the issue on the trial before the Court. *Louis Stix & Co. vs. S. Pump & Co.*..... 526
3. All misnomers in judicial proceedings on the civil side of the Court are amendable, without working unnecessary delay. *Haines vs. Curry*..... 602
4. An amendment of the pleadings is no cause for a continuance, unless the opposite party is surprised thereby and less prepared for trial in consequence thereof. *Ib.*
5. A mistake of the Clerk in copying a declaration, shall work no injury to a party, when, by amendment, justice may be promoted. Therefore, when the Clerk, in copying a declaration, inadvertently changed the order of the initials of the name of a party to a copy note sued on, such mistake is no ground for dismissing or continuing the case. *Ibid.*

## CONTRACTS.

1. When one party seeks to recover damages for the violation of a contract, the other party may show that plaintiff has not complied with his obligations under the contract, and, in good conscience, is liable to defendant. *Williams vs. Waters*..... 454
2. The well established rule of law is, that parol evidence is inadmissible to add to, take from, or vary a written contract. *Ibid.*
3. The construction of an unimpeached written contract is a question for the Court, whose duty it is to ascertain the intention of the parties, if possible, and enforce the contract according to its terms and stipulations. *Ibid.*
4. When a mere bond of indemnity is given against the payment of money due on the outstanding debts of a mercantile firm, the plaintiff must show some loss or damage sustained by the actual payment of the money due upon such debts, or that which the law considers equivalent to an actual payment thereof, in order to constitute a *breach* of the bond. The existence of a *mere legal liability* to pay such debts is not sufficient. *Harvey vs. Daniel*..... 562
5. A party, at the request of the maker of a promissory note, took it up from the payee, and the purchaser claimed a balance to be due thereon; and in consideration that the holder would not attach the property of the maker, and would permit him to move out of the State, a third party signed the note as surety. Suit was brought on the note against this surety, and the Court below decided that the note sued on did not contain such a promise in writing as would be binding under the statute of frauds, and non-suited the plaintiff: *Held*, this was error. *Green vs. Collins*..... 581
6. A promissory note given to suppress a prosecution for felony, is void. *Brown vs. Padgett*..... 609
7. Misrepresentation of a material fact made by mistake and innocently, and acted on by the opposite party, constitutes legal fraud, and the injured party may be relieved from the consequences of such misrepresentation. *Terhune vs. Dever*..... 648
8. No particular form of words is necessary to constitute a warranty. *Ibid.*

9. To make an affirmation at the time of sale a warranty, it must appear to have been so intended, and not to have been a mere expression of opinion. An affirmation of the soundness of a horse, made *bona fide* at the time of sale, does not necessarily amount to a warranty ; whether the words used amount to a warranty or not, is a question for the jury, under the rules of law applicable to the case. *Ibid.*
  10. When a party warrants the soundness of a horse, he is liable on his warranty, if the horse be unsound, whether at the time the warranty was made, he knew of the unsoundness or not. *Ibid.*
  11. A party on the first day of April, 1863, received a bill of sale, conveying to him with warranty of title, a negro slave then residing in Georgia, and who had been for three months previous thereto, and in consideration thereof, gave a promissory note for \$1,200.00. Suit was brought on the note, and a recovery had : *Held*, that the recovery was right. *Cobb vs. Battle*, 34th Ga. R., 483, in principle, covers this case. *Haslett vs. Harris*, 632 ; *N. H. S. Man'fg Co. vs. Dykes*... 632
- As to *Guaranty*, see that title.

CONVERSION. See *Railroads*.

### CONVEYANCING.

1. When a *tenant-for-life* in land, holding under the will of her deceased husband, conveyed the *entire estate* in fee simple, by deed of bargain and sale, prior to the adoption of the Code : *Held*, that by the common law of force in this State, she forfeited her life-estate in the land, and gave to the remainder-men the *right of entry thereon* ; and that the purchaser of the entire estate, and those claiming under him, holding possession thereof under color of paper title for seven years from the date of such sale, will be protected by the statute of limitations against the remainder-men, although seven years had not elapsed from the death of the tenant-for-life. *King vs. Leever*..... 199
- . At common law, a feoffment, fine, or common recovery, by a life-tenant, forfeited the estate to the next taker. (Walker, J.) *Ibid.*
- . A bargain and sale, or lease and release of the fee by a tenant-for-life, did not work a forfeiture, but the



bargainee or releasee took such interest as tenant had a right to sell. (Walker, J.) *Ibid.*

4. The old doctrine of forfeiture by alienation of a greater estate than that owned and possessed by the tenant, was never incorporated into nor became a part of the law of this State. If a tenant-for-life forfeit his estate to the remainder-man by alienation, the remainder-man then has two titles—the one by forfeiture and the other in remainder—and he may enforce either at his option, within the time prescribed by the statute of limitations. He may be barred as to one title, and yet recover upon the other. (Walker, J.) *Ibid.*
5. Where a decree, for a specific performance, is a link in a chain of title, it must be considered as if it were a deed from the party required to make a deed. *Doe, ex dem., etc., vs. Roe, as ejector, etc.*..... 321

#### COSTS.

1. \* \* \* \* *Held*, also, that the jury should not have found a general verdict for the defendant, even under section 3023 Revised Code, because the costs should be paid by defendant, notwithstanding the death or destruction of the property pending the litigation. *Burts, Adm'r, vs. Duncan et al*, 575

#### CRIMINAL LAW.

1. Unless there be great superiority in physical strength of an assailant, who strikes another a blow with his fist, or ill-health in the assailed at the time, or other circumstance producing relatively great inequality between them in combat, the assailed cannot justifiably resent the blow by stabbing the assailant. *Floyd vs. The State*..... 91
2. The general rule is, that whether the stabbing is in self-defence depends on the nature and violence of the assault made on him who stabs. *Ibid.*
3. Where a defendant is indicted and put upon his trial for the crime of murder, it is the duty of the Court to charge the jury the law defining that offence; and if the evidence shall authorize it, but not otherwise, also to give in charge to the jury the law defining the inferior grades of homicide less than murder, as declared by the Code of this State. *Washington vs. The State*. 222

4. When a defendant is indicted as the actor or *absolute* perpetrator of the crime of murder under the Code, it is error in the Court to charge the jury that they can find him guilty as principal in the second degree; but on the trial of a defendant so indicted, if the evidence shall authorize it, the Court may charge the jury, that if they believe from the evidence that it was the intention of the parties engaged in a common difficulty to do an *unlawful* act, and the defendant, in the prosecution of that intention, committed the homicide upon the deceased; or if they should believe from the evidence, that the homicide was committed upon the deceased by either of the parties engaged in the prosecution of that common intention, then they might find him guilty. *Ibid.*
5. When a verdict is found against a defendant of "guilty of murder as principal in the second degree," when he is indicted as the absolute actor and perpetrator of the crime, the verdict does not speak the *truth* as to the issue formed upon the indictment, and is error. *Ibid.*
6. When a defendant is indicted for having or carrying concealed weapons at a particular time and place, it is not competent for him to introduce evidence upon the trial, to prove that it was his general habit to carry his weapon about his person, openly exposed to view. *Washington vs. The State*..... 242
7. When the Court charged the jury on the trial of a defendant for having and carrying about his person a concealed pistol, "that if the prisoner *had a pistol*, and it was in Dr. Paris's during the morning, he was guilty, and they must so find him:" *Held*, that this charge of the Court was error. *Ibid.*
8. To constitute a house a disorderly house in law, the noises, etc., must be *ordinary and usual, or common*, and the disturbance must be *general*, and not of only one person in a thickly settled neighborhood. *Palfus vs. The State*..... 280
9. Judgment reversed, because the verdict is strongly and decidedly against the evidence. *Jones vs. The State*..... 424
10. It was a maxim of the common-law, that a man shall not twice be put in jeopardy for the same offence. *Black vs. The State of Georgia*..... 447



11. The plea of *autre fois acquit* is good only when the acquittal was on a sufficient indictment. *Ibid.*
12. The rule to determine whether an indictment is sufficient to sustain a conviction is, would the judgment be arrested if the defendant were found guilty. If it would, a verdict of not guilty under it would be no protection; otherwise it would be. *Ibid.*
13. Where a verdict of not guilty was rendered in favor of a party, though under a decision of the Court that the indictment under which it is rendered is too defective to admit testimony to be given in to convict the party; yet if that decision is wrong, and in fact a conviction could have been maintained under the indictment, such verdict and judgment, when pleaded, will protect the party against a subsequent conviction for the same offence. *Ibid.*
14. According to the decision of this Court in the case of William Gibson, a free person of color, vs. The State, decided at the December Term, 1866, the Superior Courts of this State, prior to the Act of 17th March, 1866, did not have jurisdiction for the trial of a free person of color charged with the offence of "larceny after a trust delegated," committed on the 4th of December, 1865. *Gibbons, alias Bently vs. The State*, 475

## CRUELTY.

1. Legal cruelty, which authorizes a divorce under the Code, may be defined to be such conduct on the part of the husband as will endanger the life, limb or health of the wife, or create a reasonable apprehension of bodily hurt, so as to render cohabitation unsafe. *Odom vs. Odom*..... 286
2. Condonation is a conditional forgiveness of all antecedent guilt. After a reconciliation, fresh acts of cruelty will revive acts of cruelty, and also of adultery. Condonation is not so readily presumed against the wife as the husband. Knowledge of the guilt of the husband and forgiveness by the wife, are not legally to be presumed, but must be clearly and distinctly proved, in order to bar her action. *Ibid.*

## DAMAGES.

1. If a railroad company carry off a slave without the written permission of his owner, overseer or employer,

though the slave be in company with a thief who had stolen him; the company will be liable. *Brown vs. The South-Western Railroad Company*..... 377

2. Where the owner reclaims his slave, carried off as above stated, the measure of damages is not only the hire of the slave for the time he was absent, with interest added, but in addition thereto, such reasonable and necessary expenses as he may have incurred in reclaiming the slave. *Ibid.*
3. The cause of action having occurred in this case before the Code went into effect, the plaintiff is not entitled to double the damages sustained, as provided for by section 2982 of the Code. *Ibid.*

DECLARATION OF PARTY. See *Res Gestæ*.

DEEDS. See *Conveyancing*.

DEL CREDERE AGENT. See *Evidence*, 3.

#### DISCRETION.

Discretion of the Chancellor. See *Equity*, 1, 13, 20, 23, 24; *Equity Practice*,—1, 2, 5. See *Injunction*, 1.  
 Discretion of the Judge. See *New Trial*, 9, 16, 17, 18, 19.  
 Discretion of Juries. See *New Trial*, 16.

DISORDERLY HOUSE. See *Criminal Law*, 8.

#### DISTRIBUTION OF DEBTORS' ASSETS.

1. In a creditor's bill, others, not parties, may come in after decree, submit to the jurisdiction of the Court, and have their rights passed upon, and participate in a fund to which they may be entitled, according to the principles of equity. *Martin & Yates vs. Tidwell & Favor*..... 332

#### DISTRIBUTION OF ESTATES.

1. In December, 1864, Ralston died intestate, leaving a widow and three minor children as his heirs-at-law. In March, 1865, one of the children died, and in April, 1866, another of the children died, leaving the widow and the other surviving child as their heirs-at-law. The property of Ralston, the first decedent, remained in the possession of Thornton, his adminis-

trator. In February, 1867, the widow intermarried with Bozeman. On a bill being filed by Thornton, the administrator of Ralston, for direction: *Held*, that the widow was entitled to inherit one-half of the estate, as the heir-at-law of her deceased husband and children, notwithstanding her intermarriage with Bozeman before the property had been reduced to possession by her, and that the marital rights of the husband did not attach to any part of the property under the provisions of the Act of 1866. *Ralston vs. Thornton, Adm'r.*..... 546  
See *Equity*, 29.

### DIVORCE.

1. A suit for a total divorce, brought in the name of a lunatic wife by *prochien ami*, against her husband, can not be maintained. The right to institute such suit is strictly personal. It is at the volition of the wife only, whether such suit shall be begun and prosecuted or not. The will of a *prochien ami* or guardian of a confirmed lunatic, may not be the will of the lunatic. Courts will regard only the *intelligent will* of the lunatic. *Worthy vs. Worthy*..... 45
2. The declarations of the wife when in the act of leaving her husband's house and taking certain articles of household furniture with her, made in the presence of his two sons and others, are admissible in evidence for the purpose of showing and explaining her motives and conduct at the time, although her husband was not present. *Odum vs. Odum*..... 286
3. On the trial of a libel for divorce, the ante-nuptial agreement between the parties is admissible in evidence, for the purpose of showing the source from whence the property was derived, as provided in the Code. *Ibid.*
4. Where the defendant, shortly before the separation between him and his wife, had transferred his property by deeds of conveyance to his children by a former marriage: *Held*, that the deeds were admissible in evidence, for the purpose of showing, in connection with other evidence, that the transfers of the property were made with a fraudulent intent. *Ibid.*
5. Legal cruelty which authorizes a divorce under the Code, may be defined to be such conduct on the part of the husband as will endanger the life, limb or

health of the wife, or create a reasonable apprehension of bodily hurt, so as to render cohabitation unsafe. *Ib.*

6. Condonation is a conditional forgiveness of all antecedent guilt. After a reconciliation, fresh acts of cruelty will revive acts of cruelty, and also of adultery. Condonation is not so readily presumed against the wife as the husband. Knowledge of the guilt of the husband and forgiveness by the wife, are not legally to be presumed, but must be clearly and distinctly proved, in order to bar her action. *Ibid.*
7. Alimony is an allowance out of the husband's estate, made for the *support* of the wife when living separately from him. When the verdict of the jury was in favor of a divorce *a vinculo matrimonii*, between the parties, and they further found for the plaintiff the sum of \$12,000: *Held*, that the legal effect of the verdict under the Code, is to vest that sum in her as permanent alimony for her *support* and *maintenance* during her life only, according to her rank and condition in life. *Ibid.*
8. When the Solicitor General is appointed to see that the grounds of a divorce are legal and sustained by proof, (under § 1730, Rev. Code,) he may introduce evidence, and enter fully into the defence of the case. *Creamer vs. Creamer et al.*..... 618
9. The Court has no authority to order the husband to pay the Solicitor General for his service. Counsel fees are allowed as "expenses of litigation," and can be granted only on the application of the wife. *Ibid.*

#### DOWER.

1. The approval by the Ordinary of the election of a widow to take an amount of money to be assigned to her absolutely, in lieu of her dower, should be obtained before the commissioners are appointed to assign dower. *Smith vs. Smith*..... 620

#### DURESS.

1. Concentration, by the agency of the press or by associations, of public opinion to effectuate any laudable intent, as to support the government, or to sustain legally its currency against depreciation, cannot be considered as "duress." A person acting under the influence of public opinion thus produced, is entitled

- to no relief in any Court for acts done by him under the legitimate pressure. *Jones vs. Rogers & Son*..... 157
2. But when his debtor, being a member of a vigilance committee created under the recommendation of a large public meeting of the citizens, and who publicly announced "that they will hold all persons as enemies of this Confederacy, who shall by any means depreciate the Confederate currency or shall refuse to receive it in payment of debts, and will use their best endeavors to bring all such persons to condign punishment, by legal means if the laws provide such punishment, but if not, with or *without law*,"—reports the creditor to the vigilance committee for having refused to receive from him, in payment of a debt due before the war, such currency, and *thereupon* the creditor is summoned to appear before the committee to answer for his conduct, and in the meeting is denounced by a member of the committee as a traitor, and publicly on the streets by another—the receipt of the Confederate currency under such circumstances was involuntary; it was under constraint, "duress," and fear produced by the threat of bringing him to condign punishment *with or without law*—fears for his personal safety endangered by his denunciation as a traitor. *Ib.*
3. Equity, in such case, will grant relief. *Ibid.*

## EJECTMENT.

1. Where a *tenant-for-life* in land, holding under the will of her deceased husband, conveyed the *entire estate* in fee simple, by deed of bargain and sale, prior to the adoption of the Code: *Held*, that by the common-law of force in this State, she forfeited her life-estate in the land, and gave to the remainder-men the right of entry thereon; and that the purchaser of the entire estate, and those claiming under him, holding possession thereof under color of paper title for seven years from the date of such sale, will be protected by the statute of limitations against the remainder-men, although seven years had not elapsed from the death of the tenant-for-life. *King vs. Leeves*..... 199
2. (At common-law, a feoffment, fine or common recovery by a life-tenant forfeited the estate to the next taker. A bargain and sale, or lease and release of the fee by a tenant-for-life did not work a forfeiture, but the bargainee or releasee took such interest as the life-tenant

had to sell. The old doctrine of forfeiture by alienation of a greater estate than that owned and possessed by the tenant, was never incorporated into, nor became a part of, the law of this State. If a tenant-for-life forfeit his estate to the remainder-man by alienation, the remainder-man then has two titles, the one by forfeiture and the other in remainder; and he may enforce either at his option, within the time prescribed by the statute of limitations. He may be barred as to one title, and yet recover upon the other.) (Walker, J. *Ibid.*

3. Though the attorney prosecuting a case may have no authority to use the name of a party as lessor of plaintiff in ejectment, the Court should not, for this cause, dismiss the case, unless it appear also that the client has no authority to use the name. *Shanks vs. White.* 432
4. To authorize a plaintiff in ejectment to use the name of another, he must show some connection between his title and that of the person in whose name he sues. *Ibid.*
5. A plaintiff in ejectment should be permitted to use the name of another, when he makes it clearly appear to the Court that such is necessary for the assertion of his rights. *Ibid.*
6. The name of a party may be used as lessor in ejectment, upon proper indemnity being given, not only without but against his consent, when it appears to the Court that such is important to the rights of a party. *Ibid.*
7. In an action of ejectment, a registered deed for the premises in dispute, is admissible in evidence, without further proof, unless an affidavit be filed as provided for by the Code, section 2674. *Doe, ex dem., Hollis, et al. vs. Stevens, tenant.....* 463
8. A party may attack a deed for forgery by any competent evidence, after it has been read to the jury. *Id.*
9. If an affidavit be filed as provided for by the Code, the deed cannot be read as evidence, until an issue as to its genuineness be tried. *Ibid.*
10. A party has a right to give in such competent evidence as he may think proper; and if he produce proof sufficient to satisfy the minds of the jury, they should not be told that the use of the evidence introduced, rather than of certain other testimony which

the opposite party insists would have been stronger, is a circumstance against the party introducing it. *Ibid.*

11. Proof of an *alibi* of the alleged maker of a deed at the time it bears date, is a mode of impeaching it; and such testimony is admissible for the purpose of satisfying the minds of the jury that the deed is a forgery. *Ibid.*
12. A party who claims to be the landlord of a defendant in ejectment, cannot, as matter of right, and against plaintiff's objections, be made a co-defendant, where it appears to the Court that all the title he sets up was acquired subsequently to the bringing of the action. *Roe, cas. eject., and Ralston, tenant, vs. Dover et al.*..... 611

### ELECTION.

Election of money in lieu of dower. See *Dower*.

### EMANCIPATION.

1. While the recognition by the State of Georgia of the abolition of slavery in its borders, may have been destructive of legacies of that species of property, as also of the general testamentary scheme of a testator, such facts furnish no sufficient grounds of *caveat* to the probate of a will. *Newsom vs. Tucker*..... 71
2. The doctrine in the cases of *Hand vs. Armstrong*, 34 Ga., 232; *Freeman vs. Bass*, ib., 355; and *Bass vs. Ware*, ib., 386, reaffirmed. *Bass vs. Freeman*..... 435
3. A party, on the first day of April, 1863, received a bill of sale conveying to him without warranty of title, a negro slave then residing in Georgia, and who had been for three months previous thereto,—and in consideration thereof, gave a promissory note for \$1,200; suit was brought on the note, and a recovery had: *Held*, that the recovery was right. *Cobb vs. Battle*, 34 Ga. Rep., 483, in principle covers this case. *Haslett vs. Harris and New High Shoals Man'g Co. vs. Dykes*. .... 632

### EQUITY.

1. It is a well settled rule of the Supreme Court, not to reverse a refusal to dissolve an injunction, upon the coming in of the answers of the defendants, unless it is made clearly to appear that the discretion of the

- Court was improperly exercised in retaining the injunction. *Howell et al. vs. Lee*..... 76
2. Threatened waste or destruction of timber land, by sawing up the timber, or deadening timber land preparatory to opening it for cultivation, or cutting the wood for fire-wood and sale, by any life-tenant or person claiming through such an one, will be promptly and efficiently restrained by a Court of Equity upon application by any remainder-man. *Dickinson et al. vs. Jones et al.*..... 97
3. Plaintiffs in error and others purchased from Craig a *fi. fa.* against the Lawrenceville Manufacturing Company, in which they were stockholders, and gave therefor their joint note. One of the makers of the note, by importuning Craig, procured the substitution of another promisor in his place. Suit was brought on the note, and the plea was *non est factum*, (by reason of the alteration). Equity will, under these circumstances, compel the withdrawal of that defence, or the payment on the note of so much of the proceeds or money collected by defendants on the *fi. fa.* by the sale of said company's property, as will, together with what plaintiff (Craig) had otherwise collected, pay off the note. *Lowe et al. vs. Craig*..... 117
4. When a debtor, being a member of a vigilance committee, created under the recommendation of a large public meeting of the citizens, and who publicly announced "that they will hold all persons as enemies of this Confederacy who shall by any means depreciate the Confederate currency, or shall refuse to receive it in payment of debts, and will use their best endeavors to bring all such persons to condign punishment by legal means, if the law provide such punishment, but if not, with or *without law*," reports his creditor to the vigilance committee for having refused to receive from him, in payment of a debt due before the war, such currency, and *thereupon* the creditor is summoned to appear before the committee to answer for his conduct, and in the meeting is denounced by a member of the committee as a traitor, and publicly on the streets by another, the receipt of the Confederate currency under such circumstances was involuntary; it was under constraint, "duress," and fear produced by the threat of bringing him to condign punishment *with or without law*; fears for his personal



- safety, endangered by his denunciation as a traitor. Equity in such case will grant relief. *Jones vs. Rogers & Son*..... 157
5. Specific performance of a contract in writing and under seal, made for and in behalf of minors, by an adult friend, with a brother who has attained his majority, as to the terms upon which their father's property shall be divided, will be decreed against such adult brother. *Smith et al. vs. Smith*..... 184
6. The doctrine of the *want of mutuality* in the agreement does not furnish the correct rule for the decision of the case made by the record. *Ibid.*
7. When the facts stated in a bill for relief and injunction entitle the complainant the *special assistance* of a Court of Equity, for the protection of his rights, a demurrer to the bill will be over-ruled, and the injunction continued. *Henderson vs. Turner & Howard*, 263
8. Where a decree, for a specific performance, is a link in a chain of title, it must be considered as if it were a deed from the party required to make a deed. *Doe, ex dem., etc., vs. Roe, cas. ejector, etc*..... 321
9. New parties may be made to an original bill, by an amendment in the nature of a supplemental bill; and the representatives of deceased persons may be made parties by *scire facias*. *Davis et al. vs. Singleton & Black*..... 330
10. Where a Court of Equity obtains jurisdiction for one purpose, it will retain it until complete justice is done to all the parties. *Martin & Yates vs. Tidwell & Favor*..... 332
11. In a creditor's bill, others not parties may come in after decree, submit to the jurisdiction of the Court, and have their rights passed upon, and participate in a fund to which they may be entitled, according to the principles of equity. *Ibid.*
12. A Court of Equity will enforce obedience to its orders by attachment. *Howard vs. Durand*..... 346
13. The action of the Superior Courts, in punishing parties for contempt, will not be controlled, except they abuse their discretion. *Ibid.*
14. In some cases the punishment of a party for a contempt, is a remedial proceeding to which the opposits

party is entitled, though it may be necessary for the vindication of the authority of the Court. *Ibid.*

15. In such a case, if the Court below fail to give the party his rights, this Court will correct the error, and grant the party relief to which he is entitled. *Ibid.*
16. Where a party consents to the violation of an injunction granted at his instance, and takes upon himself the management of the case, he cannot subsequently have the opposite party punished for such violation. *Ibid.*
17. A Court of Equity will not lend its punitive powers to one party, to coerce the opposite party into the making of new stipulations to which he had never agreed; nor under the pretence of punishing for breach of an injunction, attempt to enforce a contract made subsequent to its sanction. *Ibid.*
18. Equity will enforce the rights of parties; and those who invoke its aid, should not by contract render nugatory its processes. *Ibid.*
19. One judgment may, upon motion, be set off against another, when such set-off is equitable. *Skrine vs. Simmons* ..... 402
20. When a bill was filed by a complainant who alleged that he was the sole heir-at-law of a deceased intestate, praying for an injunction to restrain a temporary administrator from wasting the estate pending the litigation for permanent letters on the estate of the decedent, alleging that he had been informed and believed that the security on the temporary administrator's bond was insufficient, and that the defendant was insolvent; which prayer for injunction the Chancellor refused to sanction, upon the ground that the complainant had an adequate common-law remedy, by requiring the temporary administrator to give additional security upon his bond: *Held*, that this Court will not control the discretion of the Chancellor in refusing the injunction upon the statement of facts contained in complainant's bill, the more especially as the charges made of waste and fraud on the part of the defendant are general, without stating any particular acts of waste by the defendant, or any particular acts of fraud done by him. *Montgomery vs. Walker*,... 515
21. When goods were sold and delivered to a married woman living separate and apart from her husband in

the State of Tennessee, on her individual credit, and it appearing upon the face of the bill that by the law of that State she was considered a free dealer: *Held*, that she might be sued in Equity in the Courts of this State, and be restrained by injunction from making a fraudulent transfer of goods in her possession for the avowed purpose of defeating the claim of her Tennessee creditor, who had no adequate legal remedy against her to recover his demands. *Sands vs. Marburg*..... 534

22. Where W. borrowed of S. \$500.00, and promised to pay six per cent. per month for the use thereof for a part of the time, and five per cent. per month for the balance of the time, which was paid but not credited on the note, and afterwards sold out his entire property to a third party, who obligated himself to pay S. the \$500.00; on a bill filed by a creditor of W., against S. and the third party who purchased W.'s entire property, alleging that W. had left the State and was entirely *insolvent*, praying that the usurious interest paid by his debtor W. to S. might be credited on the \$500.00 note, and that the purchaser of W.'s property might be restrained from paying the amount of the usurious interest over to S., and be decreed to pay the same to the creditor's demand: *Held*, that the creditor was entitled to have an account taken of the amount of usury paid by W., the insolvent debtor, to S., and to have that amount applied in payment of his debt. *Pope vs. Solomons et al.*..... 541

23. A *ne exeat* issues only when the ordinary process of law is not available or sufficient against the debtor; and in every case, to entitle the party to the writ, he must show that no adequate remedy is afforded at law, and that the defendant is either removing or about to remove himself or his property, or the specific property in which complainant claims an interest. An agent may verify the application for a *ne exeat*, provided he can, of his own knowledge, state the facts as positively and distinctly as is required of the complainant himself. The Court may, however, at his discretion, require the verification by the complainant in person before granting the writ. *Orme vs. McPherson*..... 571

24. If a Court of Equity grant a new trial after a judgment rendered at law, it should be done only on a

proper case being made. This is a power which should be exercised with great caution. *Mullins vs. Christopher*..... 584

25. No degree of wrong or injustice in the determination of a case at law will entitle the injured party to resort to equity, after judgment at law, unless there be some special ground for such interposition. *Ibid.*
26. If a party by proper diligence could have protected himself at law, but by negligence failed to do so, he cannot go into equity to be relieved from the consequences of such negligence. *Ibid.*
27. As a general rule, a Court of Equity will not interfere with the regular administration of an estate by the representative; and to authorize such interference, the facts must very clearly show there is a good reason for so doing. *Moody vs. Ellerbie, Adm'r*..... 666
28. If the indebtedness of one be the foundation of the credit given to the other party, and which credit cannot be enforced at law, this may sustain a set-off in equity. *Ibid.*
29. When a judgment-debtor of an estate which is solvent and owes no debts, purchases the share of a distributee of the estate in the debt, and there appears no reason why the representative of the estate should collect said share, except for the purpose of paying back the money to the debtor, equity will restrain the collection of such portion of the judgment, and order the amount credited on the judgment. *Ibid.*

## EQUITY JURISDICTION.

1. Where a Court of Equity obtains jurisdiction for one purpose, it will retain it until complete justice is done to all the parties. *Martin & Yates vs. Tidwell & Favor*..... 332

## EQUITY PRACTICE.

1. An agent may verify the application for a *ne exeat*, provided he can of his own knowledge state the facts as positively and distinctly as is required by the complainant himself. The Court may, however, at his discretion, require the verification by the complainant in person before granting the writ.
- When O. filed a bill against M., praying a *ne exeat*, which bill was verified by F. as agent of O., and who

- was not shown to have any knowledge of the facts charged in the bill, and who simply swore that what is contained in the bill, "as far as it concerns *deponent's* own act and deed, or comes within his own knowledge, is true of his own knowledge, and that which relates to the act or deed of any other person, he believes to be true": *Held*, that this is not a sufficient verification to authorize the issuing of the writ. *Held, also*, that the affidavit must be positive and not to the best of the knowledge and belief of deponent. *Held, also*, that the allegations in the bill may be looked to in connection with the affidavit, in determining whether charges are distinctly made and verified, so as to entitle the party to the writ; the allegations in the bill, if sworn to, become in effect a part of the affidavit. *Orme vs. McPherson et al...* 571
2. Although it is a general rule that on the coming in of the answer plainly and distinctly denying all the facts and circumstances upon which the equity of the bill is based, the Court will dissolve the injunction; yet, in some particular cases, the Court will continue the injunction, though the defendant has fully answered the equity set up. The granting and continuing of the process must always rest in the sound discretion of the Court, to be governed by the nature of the case; and this Court will not control the exercise of that discretion, except in a case where the discretion has been abused. *Louis & Co. et al. vs. Bamberger, Bloom & Co.*..... 589
3. When a bill in equity is dismissed, it is out of Court, and no decree can then be rendered upon it. *Whalley et al. vs. Slaton et al.*..... 653
4. The "instructions" given by the Court to the Executor in this case are proper, but they should have been embodied in a decree. *Ibid.*
5. This Court will not control the discretion of the Chancellor in continuing or dissolving injunctions, except when there may be an abuse of discretion. *Holliday vs. McPherson & Co. et al.*..... 659
- See *Equity*, 7, and 9 to 20, inclusive.

ESTATES. See *Distribution of Estates.*

## EVIDENCE.

1. Opinions of witnesses, other than subscribing witnesses to a will, unless in questions of sanity or insanity, or those involving the admissibility of experts, are inadmissible as testimony. *Elder vs. Elder, Ex'r*, 64
2. If an ambiguity exists in a will made during the war, by the use of the word "dollars," and testimony has been admitted to show that, at the time of making the will, the currency where the testator lived consisted of Confederate States Treasury notes, the value of such currency, as compared with gold, at the time of making the will, should be allowed to be proven, so as to enable the jury to collect the intention of the testator, and render their verdict accordingly. *Ibid.*
3. An agent of a person residing out of the county where the suit is pending, acting under a *del credere* commission, and to whom or his order defendants' note sued on is payable, under the Act of 15th of December, 1866, is to be deemed as an original party to the contract, and as such is competent to testify. *Archer vs. Greer, Adm'r*..... 107
4. A judgment regularly entered up, upon an acknowledgment of service and confession of judgment by an attorney at law, is not void, but only voidable, and that upon clear and decisive proof that such attorney at law acted without any authority in the premises for the party (whom) he represented. *Dobbins vs. Dupree*..... 108
5. No warrant of attorney being required by the laws of this State or the practice of its Courts, to entitle an attorney at law to appear for a party litigant, the strong presumption from his appearance is that he was authorized. *Ibid.*
6. The declarations of the wife, when in the act of leaving her husband's house, and taking certain articles of household furniture with her, made in the presence of his two sons and others, are admissible in evidence for the purpose of showing and explaining her motives and conduct at the time, although her husband was not present. *Odom vs. Odom*..... 286
7. On the trial of a libel for divorce, the ante-nuptial agreement between the parties is admissible in evidence, for the purpose of showing the source from

- whence the property was derived, as provided in the Code. *Ibid.*..... 286
8. Where the defendant, shortly before the separation between him and his wife, has transferred his property by deeds of conveyance to his children by a former marriage: *Held*, that the deeds were admissible in evidence, for the purpose of showing, in connection with other evidence, that the transfers of the property were made with a fraudulent intent. *Ibid.*..... 286
9. Declarations made by a party in his own favor, to be admissible as part of the *res gestæ*, must be shown by proof to have accompanied the act, or to have been so nearly connected therewith in time, as to be free from all suspicions of after-thought. *Rutland vs. Hathorn.*..... 380
10. This Court will not grant a new trial on mere preponderance of evidence against the verdict, and the charge of the Court, though this Court may differ with the jury as to the preponderance of proof, provided there be sufficient evidence to support the finding, especially when the Circuit Judge refuses to grant a new trial. *Ibid.*
11. Suit was brought on a policy of insurance obligating the insurance company to pay a certain sum "within sixty days after due notice and proof of the death of" the assured: *Held*, that allegation and proof of such notice and death are conditions precedent to a recovery on such policy. *Jackson & Jackson, Ex'rs, vs. The So. Mutual Life Insurance Co.*..... 429
12. There being degrees in secondary evidence, an examined copy should be received in preference to oral testimony, and the best evidence should always be produced. *Williams vs. Waters.*..... 451
13. The well established rule of law is, that parol evidence is inadmissible to add to, take from, or vary a written contract. *Ibid.*
14. In an action of ejectment, a registered deed for the premises in dispute is admissible in evidence, without further proof, unless an affidavit be filed as provided for by the Code, section 2674. *Doe, ex dem., etc., vs. Roe, cas. ejector.*..... 463
15. A party may attack a deed for forgery, by any competent evidence, after it has been read to the jury. *Ibid.*

16. If an affidavit be filed as provided for by the Code, the deed cannot be read as evidence until an issue as to its genuineness be tried. *Ibid.*
17. A party has a right to give in such competent evidence as he may see proper ; and if he produce proof sufficient to satisfy the minds of the jury, they should not be told that the use of the evidence introduced, rather than of certain other testimony which the opposite party insists would have been stronger, is a circumstance against the party introducing it. *Ibid.*
18. Proof of an *alibi* of the alleged maker of a deed at the time it bears date, is a mode of impeaching it ; and such testimony is admissible for the purpose of satisfying the minds of the jury that the deed is a forgery. *Ibid.*
19. When a promissory note is offered in evidence, and it appears to have been altered in a material part thereof, it is incumbent on the plaintiff to explain such alteration. If a material alteration be made in a promissory note by a party claiming a benefit under it, with intent to defraud the maker or other parties to it, such alteration voids the whole contract, if they so insist ; but if the alteration was unintentional or by mistake, or not made with intent to defraud, it will be enforced by the Court. In such cases, the evidence should be clear and satisfactory upon the point that the alteration of the note was made under such circumstances as will rebut all motive of any *fraudulent intention* ; otherwise, the party making such alteration should suffer the legal consequences resulting therefrom. *Wheat vs. Arnold*..... 479
20. When the assets of a mercantile firm were placed in the hands of its confidential clerk for the purpose of collecting the same and paying therefrom the firm debts, and on a bill filed by such clerk, alleging that he had paid out of his individual funds a portion of the copartnership debts : *Held*, that notes given by the firm in his possession, and receipts for money to the firm creditors, were *competent* evidence to be submitted to the jury, though not conclusive as to the fact that the payment was made with his own money. *Scott vs. Scott, Adm'r*..... 484
21. When a plaintiff, as indorser, instituted suit on a promissory note, signed by three defendants as principal makers thereof, and one of the makers died



- pending the suit, and there being no legal representative of his estate before the Court, but the case was proceeding against the living parties only, two of the defendants having filed the plea of *non est factum*, and offered themselves as witnesses, under the statute of 1866, to prove that the dead party had no authority to sign their names to the note either as partners or otherwise: *Held*, that however it might have been, if the representative of the deceased party had been before the Court, so as to have bound the estate of the decedent by the judgment thereof, yet, as the case was proceeding only against the *living parties*, and the judgment to be rendered would only bind them, the defendants were *competent* witnesses against the plaintiff under the statute. *Field vs. Walker*..... 520
22. Turner sold to Chisholm two negroes, and warranted them sound; the purchase was made on account of Chisholm & Adair, who were partners. An action on the warranty was brought by Chisholm, who died pending the suit, and his administrator was made party plaintiff. On the trial, Adair, the partner of Chisholm, and an ussee in the action, was offered as a witness for the plaintiff, and the Court rejected him: *Held*, that the Court erred. *Chisolm, Admr vs. Turner* 565
23. A legatee propounding for probate a nuncupative will, which is *caveated* by the heirs-at-law, is a competent witness in favor of the validity of the will. *Brown et al. vs. Carroll* ..... 568
24. By the Statute, a party is a competent witness; his credit is a question for the jury. *The Atlanta and W. Pt. R. R. Co. vs. Hodnett* ..... 669
25. A public meeting of the citizens of Troup county was held for the purpose of procuring from the land owners the right of way for the Atlanta and West Point Railroad Company, from LaGrange to West Point; agents of the Company to procure such rights of way participated in the meeting; speeches were made by one of the agents, by Judge Hill and others, in which the speakers represented that the Railroad Company would make all crossings and bridges needed by the land owners through whose land the road might pass, and make a turn-out or private depot for those who might need them. The agents of the Company adopted these representations of the public speakers, and a land owner, acting on these representations, and

understanding that he was to have all these advantages, made a deed without any pecuniary consideration, conveying to the Railroad Company the right of way through his land. The Railroad Company ran the road through his land a distance of two miles, and then refused to make any proper crossings, or bridges, or turn-outs, or depot, or in any way comply with the promises which were the consideration for making the deed. A bill was filed by the grantor to set aside the deed thus procured, on the ground that it was procured by fraud, and to recover damages for the wrongful appropriation of his property by the Railroad Company: *Held*, that it was admissible to show the refusals of the Company to comply with the promises made by the agents, as a ground for cancelling the deed; and that the inducements held out in that meeting by the public speakers, under the facts of this case, were admissible for the same purpose. *Ibid*.

### EXECUTION.

1. When an execution has been levied on the property of the defendant sufficient to pay the debt, and afterwards such levy is dismissed by the plaintiff without the sale of the property, the mere fact of the dismissal of the levy by the plaintiff, when shown to have been unproductive, does not destroy the lien of his judgment, and postpone the same in favor of junior judgment creditors. *Rawson vs. Davis, et al.*..... 511

EXECUTOR DE SON TORT. See *Attachments*, 5.

### FEEES.

1. The Court has no authority to order the husband to pay the Solicitor General for this service (in divorce suit.) Counsel fees are allowed as "expenses of litigation," and can be granted only on the application of the wife. *Creamer vs. Creamer, et al.*..... 618
2. In an action for a *tort*, the parties cannot, by a settlement between themselves, defeat any lien or claim which the attorney may have under a contract with his client, of which the opposite party had notice prior to the consummation of such settlement. The mere fact that an attorney appears in the cause is not such notice. The party must have notice of the claim under a special contract to affect him. *Gray et al. vs. Lawson* ..... 629

3. If an attorney have a lien by a special contract, the Court, in a case of *tort*, should not direct a verdict to be taken for the value of the attorney's services, but should send the case to the jury upon the merits, as between plaintiff and defendant, and if the verdict be sufficiently large, the attorney can be paid thereby, otherwise not. Whether the defendant in such case shall pay the fees of an attorney for the plaintiff, must depend upon the recovery by the plaintiff in the trial upon the cause sued on. *Ibid.*

FEME COVERT. See *Married Women*.

FIFA. See *Execution*.

FORGED DEEDS. See *Ejectment*, 7, 8, 9, 10, 11.

### FRAUD.

1. Misrepresentation of a material fact made by mistake, and innocently, and acted on by the opposite party, constitutes legal fraud, and the injured party may be relieved from the consequences of such misrepresentations. *Terhune vs. Dever*..... 648

See *Promissory Notes*, 4.

### GUARANTY.

1. Certain stockholders of a company, under their hands and seals, guaranteed the payment of all the debts of said company then outstanding, and bound them to pay all of said debts to the creditors, who would indulge the company upon their claims for ten months from that date: *Held*, that a creditor of the company at the time, who indulged the company ten months, was entitled to recover the amount of his debt against the company from said stockholders, without having notified them that they would so indulge the company. By complying with the terms prescribed, the creditor entitled himself to the benefit of the provisions of the guaranty or obligation. *Sanders vs. Etcherson*..... 404

HOMICIDE. See *Criminal Law*, 3, 4, 5.

### HUSBAND AND WIFE.

1. The laws of Georgia allow a widow one year's sup-

- port for herself and minor children out of the estate of her deceased husband. They do not contemplate that she shall live at the homestead, and consume the provisions belonging to the estate, and have a year's support also allowed. *Wells vs. Wilder*..... 194
2. Whenever the widow applies for an assignment of the year's support, she must be charged with the value of what she previously consumed. *Ibid.*
3. When the mother and the reputed father of illegitimate children have intermarried, and the father recognizes the children to be his, the children are rendered legitimate under the Code, and such father of colored minor children (the mother being dead) is entitled to the custody and control of them. *Adams vs. Adams* ..... 236
4. A married woman, who as a midwife acquires money by her separate earnings, with the consent of her husband, and afterwards, with his consent, purchases real estate, and takes the title thereto in her own name, may devise the same by will, as her separate estate, with or without his assent, and after her death the husband cannot invalidate such devise by a change of the title to the property in his own name, especially when his *express assent* was given to such devise at the time of the execution of the will. *Cavanaugh et al. vs. Ainch-backer* ..... 500
5. \* \* \* \* \* *Held*, that the widow was entitled to inherit one-half of the estate, as heir-at-law of her deceased husband and children, notwithstanding her intermarriage with Bozeman before the property had been reduced to possession by her, and that the marital rights of the husband did not attach to any part of the property under the provisions of the Act of 1866. *Ralston vs. Thornton, Adm'r*..... 546
- See *Alimony*.  
 “ *Condonation*.  
 “ *Cruelty*.  
 “ *Divorce*.  
 “ *Married Women*.  
 “ *Widow*.

HIGHWAYS. See *Ways*.

#### HYPOTHETICAL CHARGE.

See *Charge of the Court*, 1, 5.

IMPEACHMENT OF VERDICT. See *Jury*, 4.

ILLEGITIMATES. See *Minors*, 2, 3, 4.

### INDICTMENT.

1. The rule to determine whether an indictment is sufficient to sustain a conviction, is, would the judgment be arrested if the defendant were found guilty. If it would, a verdict of not guilty under it, would be no protection; otherwise, it would be. *Black vs. The State of Georgia*..... 447
2. Where a verdict of not guilty has been rendered in favor of a party, though under a decision of the Court that the indictment under which it is rendered, is too defective to admit the testimony to be given in to convict the party; yet, if that decision was wrong, and in fact, a conviction could have been maintained under the indictment, such verdict and judgment, when pleaded, will protect the party against a subsequent conviction for the same offence. *Ibid.*

INFANTS—CONTRACTS OF. See *Equity*, 5, 6.

INHERITANCE. See *Distribution of Estates*.

### INJUNCTION.

1. It is a well settled rule of the Supreme Court not to reverse a refusal to dissolve an injunction upon the coming in of the answers of the defendants, unless it is made clearly to appear that the discretion of the Court was improperly exercised in retaining the Injunction. *Howell et al. vs. Lee*..... 76
2. Threatened waste or destruction of timber land, by sawing up the timber, or deadening timber land preparatory to opening it for cultivation, or cutting the wood for firewood and sale, by any life-tenant, or person claiming through such an one, will be promptly and efficiently restrained by a Court of Equity upon application by any remainder-man. *Dickinson et al. vs. Jones et al.*..... 97

See further as to *Injunction against Waste*, *Equity*, 20.

As to *Waiver of Injunction*, See *Equity*, 16, 17, 18.

INSANITY. See *Divorce*, 1.

INTENT. See *Criminal Law*, 4.

# INTRUDERS ON LAND.

1. In a proceeding to eject an intruder from the possession of land, under the 4000th Section of the Revised Code, if the defendant fails *at once* to tender to the Sheriff such an affidavit as is required thereby, he will be turned out ; he will not be allowed to tender a *defective* affidavit, retain possession under that, and when it is decided against him, tender another affidavit in terms of the law to protect his possession. *Hass vs. Gardner* ..... 477

# JUDGMENTS.

1. A judgment regularly entered up upon an acknowledgment of service and confession of judgment by an attorney at law, is not void, but only voidable, and that upon clear and decisive proof that such attorney at law acted without any authority in the premises for the party (whom) he represented. *Dobbins vs. Dupree*..... 108
2. No warrant of attorney being required by the laws of this State, or the practice of its Courts, to entitle an attorney at law to appear for a party litigant, the strong presumption is that he he was authorized. *Ibid.*
3. A judgment rendered by a Court of competent jurisdiction cannot be collaterally attacked ; it is valid until set aside according to the rules of law. *Skrine vs. Simmons* ..... 402
4. One judgment may, upon motion, be set off against another when such set-off is equitable. *Ibid.*
5. Where a judgment has been rendered, and execution issued therefrom, the mere absence of the execution unaccounted for, is no evidence that the judgment has been satisfied. If a party alleges the payment, he should establish the fact of such payment by proof. *Sanders vs. Etcherson*..... 404
6. When a promissory note has been placed in the hands of an attorney for collection, and suit had been instituted thereon in the name of the plaintiffs, the rightful owners thereof, against the defendants, and pending the suit, the plaintiff's attorney, on his own motion, moved the Court to strike out the names of the origi-

- nal plaintiffs, and substitute in place thereof the name of a party who had no legal valid title to said note, and proceeded to take a verdict and sign judgment thereon in the name of such substituted party plaintiff against the defendants, which had been paid off by them : *Held*, that there was no error in the Court below in refusing to set aside and vacate the judgment on motion of plaintiff's attorney in said case for the benefit of his clients, who were the original plaintiffs in the case, against the consent of the defendants, who are entitled to be protected in the payment of that judgment under the statement of facts presented by the record. *Penfold, Clay & Co. vs. Singleton & Co.*..... 556
7. If a Court of Equity grant a new trial after a judgment rendered at law, it should be done only on a proper case being made. This is a power which should be exercised with great caution. *Mullins vs. Christopher*..... 584
8. No degree of wrong or injustice in the determination of a case at law, will entitle the injured party to resort to Equity, after judgment at law, unless there be some special ground for such interposition. *Ibid.*
9. The ordinance of the Convention of November, 1865, "to adjust the equities between parties," applies to contracts and not to judgments. *Ibid.*
10. All judgments rendered prior to 8th November, 1865, were ratified and affirmed by the Convention, (Art. V, Sec. 1, Par. 7) subject only to reversal by motion for new trial, appeal, bill of review, or other proceedings in conformity with the law of force when they were rendered. *Ibid.*
11. When the plaintiff in his declaration claimed only \$100, the mere fact that the copy note attached to the declaration, and the note itself, when introduced in evidence, was for more than \$100, was no ground for arresting the judgment. *Wilhelms vs. Noble Brothers & Co.*..... 599

#### JUDGMENT OF SUPREME COURT FINAL.

1. When a case has been heard and decided in this Court, (the Court having jurisdiction of the parties, and the subject matter as provided by law) its judgment is final and conclusive as to the rights of the parties in that case, and a rehearing will not be allowed. *Rust, Survivor, etc. vs. Garmany, Agent, etc.*..... 257

JURISDICTION. *Equity.*

1. Where a Court of Equity obtains jurisdiction for one purpose, it will retain it until complete justice is done to all parties. *Martin & Yates vs. Tidwell & Favor...* 332
2. In a creditor's bill, others not parties, may come in after decree, submit to the jurisdiction of the Court, and have their rights passed upon, and participate in a fund to which they may be entitled, according to the principles of equity. *Ibid.*
3. Although a party may have a common-law remedy, yet, if it is not as complete and effectual as it would be in a Court of Equity, the latter Court having first taken jurisdiction of the cause, will retain it. *Pope vs. Solomons et al.*..... 541

## JURISDICTION OF COUNTY COURTS.

1. Under the provisions of the Act of 1866, the County Judge has no jurisdiction to bind out colored minor children as apprentices, unless such minor children are residents of the county, and their parents reside out of the county, or are dead, the profits of whose estate are insufficient for their support and maintenance, or their parents, if residing in the county, are, from age, infirmity or poverty, unable to support them. *Adams vs. Adams*..... 236
2. The County-Court, at its monthly sessions, under the Act organizing that Court, had jurisdiction in all civil cases in which not more than one hundred dollars was "claimed" as damages or principal due; and when the plaintiff in his declaration in said Court claimed only one hundred dollars to be due him, and the judgment of the Court was for less than that sum, under the peculiar language of the statute, giving the jurisdiction to the Court, the judgment should be sustained, notwithstanding the note, the foundation of the suit, was for a larger amount than one hundred dollars. *Wilhelms vs. Noble Bros. & Co.*..... 599

## JURISDICTION OF THE ORDINARY.

1. The Ordinary of the county of the mother's residence, has no authority to apprentice an illegitimate without the consent of the mother, unless she be unable to support her child, or some other legal reason is shown why she should be deprived of the custody of it. *Alfred vs. McKay*..... 440



## JURISDICTION OF SUPERIOR COURTS.

1. The vesting, by the Legislature, in County-Courts, the trial of minor offences, including simple larceny, does not confer on such courts *exclusive* jurisdiction. Under the Constitution, *concurrent* jurisdiction remains in the Superior Courts. *Shute vs. The State*.... 87
2. According to the decision of this Court in the case of William Gibson, a free person of color, vs. The State, decided at the December term, 1866, the Superior Courts of this State, prior to the Act of 17th March, 1866, did not have jurisdiction for the trial of a free person of color, charged with the offence of "larceny after a trust delegated" committed on the 4th December, 1865. *Gibson, alias Bently, vs. The State*..... 475

## JURISDICTION OF SUPREME COURT.

1. When a case is brought before this Court by a written agreement of the counsel of the parties, alleging that certain errors were committed in the Court below, without a certificate of the presiding Judge that the same is true and consistent with what transpired before him in the Court below, the case will be dismissed. *Kiser vs. The State*..... 260
2. When a cause was tried before a *petit* jury, and a verdict rendered, one of the defendants on the 13th day of April, 1866, presented his bill of exceptions to the presiding Judge, who signed and certified the same on that day; on the 17th day of the same month, before the bill of exceptions was filed in the clerk's office, the said defendant entered an appeal from the verdict of said *petit* jury according to law, and on the 19th day of said month filed his bill of exceptions in said clerk's office, whereby the cause was heard and decided in the Supreme Court upon said bill of exceptions, (the counsel of the defendant in error having knowledge that an appeal had been entered from the verdict in the Court below): *Held*, that this Court had no jurisdiction to hear and decide the cause upon said bill of exceptions, when the cause was pending in the Court below on the appeal, and that the Court below erred in dismissing said appeal, the same having been legally entered. *Armstrong vs. Hand & Bagley*..... 267
3. This Court has no original jurisdiction. *McRae vs. Adams*..... 442

4. It is organized to correct the errors in law and equity from the Courts; it has no power to correct the errors committed by juries. Therefore, in a case where a verdict was rendered, and no motion for a new trial made, but the case is brought to this Court on the grounds alone that the verdict was against the law, the evidence and the charge of the Court, a new trial will not be granted by this Court. *Ibid.*
5. If a party be dissatisfied with a verdict in the Court below, he should move for a new trial, and the ruling of the Court upon that motion is subject to review by this Court. *Ibid.*
6. This Court will confine itself to the duty of correcting the errors of the Courts below, and will not usurp the powers which, according to law, belong to those Courts. *Ibid.*

## JURY.

1. While the conduct of the jurymen (Jones) was unbecoming, yet, as it was known to the counsel complaining before the verdict was rendered, it is no good cause for a new trial. *Martin & Yates vs. Tidwell & Favor*..... 332
2. In civil cases, it is within the discretion of the Court to allow the jury to be polled or not. *Rutland vs. Hathorn*..... 380
3. If the jury, after agreeing upon their verdict, disperse by consent of the parties, the Court is not bound, upon the subsequent return of the verdict, to poll the jury. *Ibid.*
4. A juror will not be heard in impeachment of his own verdict. *Ibid.*
5. Under the ordinance of the Convention, juries should be allowed a liberal discretion in adjusting the equities of the parties by their verdict; but it is the duty of the Court to see to it that such discretion is not *abused* and made the instrument of *injustice*, by granting a new trial when the verdict is strongly and decidedly against the evidence and the principles of equity as manifested thereby. *Oliver et al. vs. Coleman et al.*.... 552

As to discretion of jury, see *New Trial*, 16.

## LACHES.

1. If a party by proper diligence could have protected

himself at law, but by negligence failed to do so, he cannot go into equity to be relieved from the consequences of such negligence. *Mullins vs. Christopher..* 584

As to *laches* in failing to attend adjourned Court, see *Attorneys*, 4.

### LICENSE.

1. When a physician is licensed by the authority of the State to practice medicine, the city of Savannah cannot require him, under a penalty, to take out license before he can practice his profession in the city. *The Mayor, etc., of Savannah vs. Charlton.....* 460
2. The practice of his profession in the city is the subject of taxation by the corporation, but not of a license. *Ibid.*
3. When a physician, without a diploma, has obtained a license to practice his profession from a member of the "Medical Board of Georgia" for each year, though more than one year, he is entitled to charge and collect his fees: *Provided*, the Medical Board has not refused to grant him a license in the meantime. *Wragg vs. Strickland.....* 559

### LIEN.

1. When an execution has been levied on the property of the defendant sufficient to pay the debt, and afterwards such levy is dismissed by the plaintiff without the sale of the property, the mere fact of the dismissal of the levy by the plaintiff, when shown to have been unproductive, does not destroy the lien of his judgment and postpone the same in favor of junior judgment creditors. *Rawson vs. Davis et al.....* 511
  2. In an action for a *tort*, the parties cannot, by a settlement between themselves, defeat any lien or claim which the attorney may have under a contract with his client, of which the opposite party had notice prior to the consummation of such a settlement. The mere fact that an attorney appears in the cause, is not such notice. The party must have notice of the claim under a special contract, to affect him.
- If an attorney have a lien by special contract, the Court, in a case of *tort*, should not direct a verdict to be taken for the value of the attorney's services, but should send the case to the jury upon the merits, as between plaintiff and defendant; and if the verdict

be sufficiently large, the attorney can be paid thereby, otherwise not. Whether the defendant in such a case shall pay the fees of an attorney for the plaintiff, must depend upon the recovery by the plaintiff in a trial upon the merits of the cause sued on. *Gray et al. vs. Lawson, usee, etc.*..... 629

# LIMITATION OF ACTIONS, Etc.

1. A *mandamus nisi* to a Judge of the Superior Court, will be refused, when the parties to the suit, by their written agreement, for their mutual convenience, did not present a bill of exceptions for his certificate and signature until six months after the adjournment of the Court at which the trial was had. *Engel vs. Speer*..... 258
  2. At common-law, a judgment twenty years old is presumed to be paid. *The State of Tennessee vs. Virgin, Adm'r*..... 388
  3. Plaintiff declared on a judgment rendered in favor of the State, in the State of Tennessee in 1838, to which the defendant pleaded the statute of limitations. The Court sustained the plea, and decided that the plaintiff could not recover: *Held*, that the Court decided right. *Ibid.*
  4. By the Act of 1854, a credit entered on a promissory note in part payment thereof, after the statute of limitations had commenced running, in order to form a *new starting point* from which the statute will commence to run, must be *subscribed* by the party making it or by some other person, by him *lawfully* authorized to do so. *Green vs. Hall, Adm'r*..... 538
- As the law stood at the time of the passage of the Act of 1854, it took effect from the date of its passage, and not from the time of its publication. *Ibid.*
5. Gordon died in Mississippi, in 1839, leaving a will, by which he bequeathed certain negroes to his wife during widowhood, and appointed Turner his Executor, who qualified in Mississippi, in January, 1840. On the 18th of May, 1845, the widow married Martin, and Martin took possession of the negroes and held them until the 9th of May, 1851, when he brought them clandestinely from Mississippi to Georgia, and sold them to Duncan for \$1,600.00. In April, 1860, Burts was appointed in Georgia admin-

istrator, with the will annexed, of Gordon, and on the 24th of April, 1860, demanded the negroes from Duncan, who refused to give them up, and suit was brought for them on the same day by Burts: *Held*, that inasmuch as Turner, the Mississippi Executor, could not maintain an action in Georgia to recover the negroes, the statute of limitations did not begin to run against the estate of Gordon for five years from the time that Duncan took possession of the negroes, and that under the facts of the case Duncan is not protected by the statute of limitations. *Burts, Admr, vs. Duncan, et al.*..... 575

### LOST PAPERS.

1. By the Act of 7th March, 1866, copies of lost bonds or notes may be established without requiring indemnity, unless the party liable for the payment of such lost paper shall make oath, as required by the second section of said Act, which being done, the party seeking to establish the copy-bond or note, shall be remitted to the remedies provided by law, before the passage of the Act of 1866. *Mayor, etc., of Savannah vs. Burroughs*..... 212  
*The Same vs. Cohen*, ..... 219
2. Upon a petition to establish a copy of a lost promissory note, and issue joined as to the making of the note, the parties are entitled to a trial by a *petit jury*, with a right to appeal to a special jury. *Rutland vs. Hathorn* ..... 380

LUNATIC. See *Divorce*, 1. .

### MANDAMUS.

1. Under the Act of December 10th, 1866, "To provide for the citizens of Twigg county to settle the question of the removal of the county site," (Pamph. Acts, p. 44,) the Superior Court, by *mandamus*, required the Inferior Court of that county to turn over to the building committee appointed by the citizens of Jeffersonville and vicinity the court-house and jail, upon said committee giving security for their complying faithfully with the terms of said Act: *Held*, that the Superior Court did right. *Justices Inferior Court Twiggs Co. vs. Griffin et al.*..... 398
- See *Limitations of Actions*, 1.

## MARRIED WOMEN.

1. A married woman in this State, who, as a midwife, acquires money by her separate earnings, with consent of her husband, and afterwards, with his consent, purchases real estate and takes the title thereto in her own name, may devise the same by will, as her separate estate, with or without his assent ; and after her death, the husband cannot invalidate such devise by a change of the title to the property in his own name, especially when his *express assent* was given to such devise at the time of the execution of the will. *Cavanaugh et al vs. Ainchbacker*..... 500
  2. Where goods were sold and delivered to a married woman living separate and apart from her husband in the State of Tennessee, on her individual credit, and it appearing on the face of the bill that by the laws of that State she was considered as a free dealer : *Held*, that she might be sued in equity in the courts of this State, and be restrained by injunction from making a fraudulent transfer of goods in her possession, for the avowed purpose of defeating the claim of her Tennessee creditor, who had no adequate legal remedy against her to recover his demands. *Sands vs. Marburg*..... 534
- See *Alimony, Condonation, Cruelty, Divorce, Husband and Wife, Widow.*

## MINORS.

1. Under the provisions of the Act of 1866, the County Judge has no jurisdiction to bind out colored minor children as apprentices, unless such minor children are residents of the county, and their parents reside out of the county, or are dead, the profits of whose estate are insufficient for their support and maintenance, or their parents, if residing in the county, are, from age, infirmity, or poverty, unable to support them. *Adams vs. Adams*..... 236
2. When the mother and reputed father of illegitimate children have intermarried, and the father recognizes the children to be his, the children are rendered legitimate under the Code, and such father of colored minor children, the mother being dead, is entitled to the custody and control of them. *Ibid.*
3. The mother of an illegitimate is entitled to its custody. *Alfred vs. McKay*..... 440

4. The Ordinary of the county of the mother's residence has no authority to apprentice an illegitimate without the consent of the mother, unless she be unable to support her child, or some other legal reason be shown why she should be deprived of the custody of it. *Ib.*

### MISNOMER.

1. All misnomers in judicial proceedings on the civil side of the Court, are amendable, without working unnecessary delay. *Haines vs. Curry* ..... 602

### MISREPRESENTATION. See *Fraud*.

### MISTAKE.

1. A mistake by the clerk in copying a declaration shall work no injury to a party, when by amendment justice may be promoted. *Haines vs. Curry*..... 602
2. When the jury mistake the *character* of the case or of the evidence and the *amount* and *kind* of testimony, it is a good ground for new trial. *Palfus vs. The State* ..... 280

See *Promissory Notes*, 4.

### MORTGAGE.

1. This South Carolina mortgage sought to be enforced on lands lying in Georgia, can only be regarded (looking to the case made by the record), as a *security* for the payment of the debt due by Tucker to Toomer, for the purchase of a large number of slaves. The condition of the mortgage being broken by Tucker, the legal title was thereupon vested in the mortgagee, only for specified purposes, and it does not, therefore, operate as a payment. *Tucker vs. Toomer*..... 138
2. The absolute ownership of these negroes, (the possession never having changed after the sale,) continued in Tucker, until, by the acts of the United States Government, they were made free, and the loss must be borne by him. *Ibid.*
3. The facts of this case would not justify an apportionment of said loss between the vendor and vendee. *Ib.*
4. This case is fully covered by *Freeman vs. Bass*, decided by this Court at June term, 1866. *Ib.*
5. The doctrine in the cases of *Hand & Armstrong*, 34th Ga., 232, *Freeman vs. Bass*, *ib.*, 355, and *Bass vs. Ware*, *ib.*, 386, reaffirmed. *Bass vs. Freeman*..... 435

6. In a proceeding to foreclose a mortgage on real estate under the provisions of the Code, the mortgagor cannot set up as a defence for himself, against the mortgagee, that the property so mortgaged was trust property, and that he had no right to mortgage it. The mortgagee has the right to foreclose his mortgage as against him, there being no other parties interested before the Court. *Boisclair vs Jones*..... 499

NE EXEAT. See *Equity Practice*, 1.

NEGLIGENCE. See *Laches*.

### NEW TRIAL.

1. A new trial will be granted when the verdict is strongly against the weight of the testimony.\* *Wall vs. McCrary*..... 56
2. A charge unauthorized by the evidence is good ground for new trial. *Ibid.*
3. The verdict is against the weight of the evidence. *Dobbins vs. Dupree*..... 108
4. A verdict will not beset aside, (and a new trial granted) as being contrary to evidence, where the case has been fairly submitted to the jury on its merits, and no rule of law was violated, nor manifest injustice done, although there may appear to have been, a preponderance of evidence against the verdict, especially if the Judge who tried the cause is satisfied with the finding. *Rutherford vs. Newsom*..... 246
5. Whilst this Court will maintain its right and duty to grant a new trial in all cases, where the verdict is strongly and decidedly against the weight of evidence, and manifest injustice has been done; yet, as a general rule, it will be extremely cautious in interfering with the verdicts of juries, upon the ground that they are contrary to evidence and the weight of the evidence, when no rule of law has been violated. *Ibid.*
6. Where there is no evidence to sustain a verdict, the same will be set aside. *Palfus vs. The State*..... 280
7. When the jury mistake the *character* of the case, or of the evidence, and the *amount and kind* of testimony, it is good ground for a new trial. *Ibid.*
8. When the Court below is dissatisfied with a verdict and grants a new trial, and no principle of law is



- thereby violated, and the testimony leaves important points in doubt, which doubts can be removed on another trial, this Court will not disturb the ruling. *Doe, ex dem., etc., vs. Roe, oas. ejector, etc.*..... 321
9. There being evidence to sustain the verdict in this case, and the Judge who tried it being satisfied with it, a new trial is refused. *Martin & Yates vs. Tidwell & Favor* ..... 332
10. New trial granted because the verdict is decidedly and strongly against the weight of evidence. *Field vs. Leak* ..... 362
11. When a verdict, fully sustained by the evidence, is set aside by the Court as against the weight of evidence, and a new trial is granted, this Court will reverse the judgment and allow the verdict to stand. *Sharp vs. Bonner, Adm'r.*..... 418
12. Judgment reversed because the verdict is strongly and decidedly against the evidence. *Jones vs. The State*..... 424
13. Where a verdict was rendered and no motion for a new trial made, but the case is brought to this Court on the grounds alone that the verdict was against the law, the evidence and the charge of the Court, a new trial will not be granted by this Court. If a party be dissatisfied with the verdict in the Court below, he should move for a new trial, and the ruling of the Court upon that motion is subject to review by this Court. *McRae vs. Adams*..... 442
14. This Court will confine itself to the duty of correcting the errors of the Court below, and will not usurp the powers which, according to law, belong to those Courts. *Ibid.*
15. Although the charge of the Court was too *stringent* in confining the inquiry of the jury as to the *precise day* on which the attachment was sued out; yet, the verdict being right under the evidence contained in the record, a new trial will not be granted for that error in the charge of the Court. *Louis Stix & Co. vs. S. Pump & Co.*..... 526
16. Under the ordinance of the Convention, juries should be allowed a liberal discretion in adjusting the equities of the parties by their verdict; but it is the duty of the Courts to see to it that such discretion is not *abused* and made the instrument of *injustice*, by grant-

- ing a new trial when the verdict is strongly and decidedly against the evidence and the principles of equity as manifested thereby. *Oliver et al. vs. Coleman et al.* 552
17. This Court will not control the discretion of the Court below, except in a case where the discretion has been abused. *Thornton vs. Hollis*..... 595
18. Where the Court below grants a new trial, and no principle of law is violated, this Court will not disturb the ruling. *Hurley et al. vs. Gauley et al.*..... 604
19. This Court will more reluctantly control the action of the Court below when a new trial has been granted, than when one has been refused. *Ibid.*
20. The refusal of the Court to permit a party to be made a co-defendant, is no ground for a new trial, especially where it appears that he had on the trial all the advantages of his title in favor of the possession of his tenant, in whose name he was permitted to defend, and it appears from the whole case that justice has been done. *Roe, cas. eject. and Ralston vs. Dover et al.* 611
21. Where a case is fairly submitted to the jury, no principle of law violated, and it appears from the whole case that substantial justice has been done, a new trial should not be granted. *The Covington Mills Co. vs. Summers, Admr.*..... 615
22. Although the charge of the Court may not be technically accurate, yet, if in effect he had submitted to the jury the legal rules which should control their finding, and it appears from the whole case that justice has been done, a new trial should not be granted. *Terhune vs. Dever*..... 648

# NON EST FACTUM.

See *Promissory Notes*, 1, 4.

# NOTICE.

See *Attorney*, 4. See *Certiorari*, 2, 3, 5. See *Guaranty*, 1.

OPINIONS OF WITNESSES. See *Evidence*, 1.

# ORDINANCE OF 1865—SCALING ORDINANCE.

1. If an ambiguity exists in a will made during the war, by the use of the word "dollars," and testimony has been admitted, to show that at the time of making the

will, the currency where the testator lived consisted of Confederate treasury notes, the value of such currency, as compared with gold, at the time of making the will, should be allowed to be proven, so as to enable the jury to collect the intention of the testator, and render their verdict accordingly. *Elder vs. Ogletree, Ex'r*..... 64

2. Where parties made an agreement by which one pays and another receives a certain amount which is entered as a credit on a promissory note, the note is extinguished *pro tanto*, and the remainder due upon the note stands unaffected by the entry of the credit. The amount thus credited cannot be enlarged in the absence of any agreement of the parties, so as to extinguish a greater nominal amount of the note than the amount named in the credit. *Mordecai vs. Stewart*..... 126
3. On the trial of an action on a promissory note given in consideration of Confederate notes, the Court charged the jury: "that in determining the equities in this case, you may consider the law read from the Code, (Sec. 2723) authorizing the holder of a note payable in specifics, on failure of payment, to recover the value of such articles at the time the note is due and payable, but you are not bound to do so:" *Held*, that this charge is erroneous, being calculated to make the jury believe that the value of Confederate notes, at the time the note falls due, is the amount for which they should find. *Cherry vs. Walker*..... 327
4. New trial granted because the verdict is decidedly and strongly against the weight of evidence. *Field vs. Leak*..... 362
5. Under the ordinance of the Convention, juries should be allowed a liberal discretion in adjusting the equities of the parties by their verdict; but it is the duty of the Court to see to it that such discretion is not *abused* and made the instrument of *injustice*, by granting a new trial when the verdict is strongly and decidedly against the evidence and the principles of equity as manifested thereby. *Oliver et al. vs. Coleman et al.* 552
6. The ordinance of the Convention of November, 1865, "to adjust the equities between parties," applies to contracts and not to judgments. *Mullins vs. Christopher*..... 584
7. The ordinance of the Convention of 1865, "to adjust

the equities between parties to contracts," applies in terms to contracts and not to wills. *Whalley et al. vs. Slaton et al.*..... 653

# PARENT AND CHILD.

See *Minors*.

See *Distribution of Estates*.

PAROL TESTIMONY. See *Evidence*, 2, 12, 13.

# PARTIES—COMPETENCY AS WITNESSES.

See *Evidence*, 3, 21, 22, 23, 24.

# PARTNERS AND PARTNERSHIP.

1. A partnership may exist where there is a joint interest in property and in the profits and losses of the adventure. *Martin & Yates vs. Tidwell & Favor*..... 332
2. The sale by one partner of the copartnership effects in payment of his *individual* debt, is not binding upon the other partners, without their knowledge and assent thereto, be *clearly and distinctly proved*. *Wise vs. Copley, Stone & Co.; Riddle vs. Copley, Stone & Co*..... 508

PAUPERS. See *Minors*, 1, 4.

PETITION. See *Pleading*.

# PHYSICIAN.

1. When a physician is licensed by the authority of the State to practice medicine, the city of Savannah cannot require him, under a penalty, to take out license before he can practice his profession in the city. *Mayor, etc., of Savannah vs. Charlton*..... 460
2. The practice of his profession in the city is the subject of taxation by the corporation, but not of a license. *Ibid.*
3. When a physician without a diploma, has obtained a license to practice his profession from a member of the "Medical Board of Georgia" for each year, though more than one year, he is entitled to charge and collect his fees; provided, the Medical Board has not refused to grant him a license in the meantime. *Wragg vs. Strickland*..... 559

## PLEADING.

1. A suit for a total divorce brought in the name of a lunatic wife, by *prochien ami*, against her husband, cannot be maintained. The right to institute such suit is strictly personal. It is at the volition of the wife only, whether such a suit shall be begun, and prosecuted or not. *Worthy vs. Worthy*..... 45
2. The will of a *prochien ami* or guardian of a confirmed lunatic, may not be the will of the lunatic. Courts will regard only the *intelligent will* of the lunatic. *Ibid.*
3. Trespass *vi et armis* does not lie against a surgeon of a military post, who makes a requisition of the commanding officer for a particular house, as in his opinion suitable for a hospital, it not appearing that the Surgeon participated personally, or rendered aid, or incited the forcible dispossession of the plaintiff. *McIntyre vs. Green*..... 48
4. A *qui tam* action by the common law, generally should be instituted in the name of the King. *O'Kelly vs. The Athens Manufacturing Company*..... 51
5. By the (new) Code of Georgia, it should be in the name of the Governor, or the Attorney General, or Solicitor General. *Ibid.*
6. It cannot be brought and prosecuted in the name of the informer, unless a right *thus* to sue shall have been given him *distinctly* by statute. *Ibid.*
7. That the affidavit contains two grounds on which an attachment issues, instead of one, is not a good objection to the attachment. *Kennon & Klink vs. Evans, Gardner & Co.*..... 89
8. The allegation in an affidavit "that said Kennon & Klink are removing their property to be removed beyond the limits of this State, and that said John F. Klink is absconding," is a substantial compliance with our attachment laws, which are now to be *liberally* construed. *Ibid.*
9. A creditor of an individual member of a mercantile firm, who purchases goods of such individual member at his own solicitation, knowing the goods so purchased to be copartnership property, which goods were charged to the purchaser on the copartnership books, cannot, in a suit instituted by the copartnership

- or their assignee for the value of the goods, plead payment or a set-off thereto, the indebtedness of such individual partner, in bar of plaintiff's right to recover in such suit. *Wise vs. Copley, Stone & Co.; Riddle vs. Copley, Stone & Co.*..... 508
10. *Held*, that the Court will not control the discretion of the Chancellor in refusing the injunction upon the statement of facts contained in complainants' bill; the more especially as the charges made of waste and fraud on the part of the defendant, are general, without stating any particular *acts of waste* by the defendant, or any particular *acts of fraud* done by him. *Montgomery vs. Walker*..... 515
11. If the petition and process substantially conform to requisites of the Code, and the defendant have notice of the pendency of the cause, all other objections shall be disregarded; provided, there is a legal cause of action set forth as required by the Code. *Haines vs. Curry*. 602

## POSSESSORY WARRANT.

1. Possessory warrants cannot be sustained when brought against public officers, as sheriffs and constables, to recover *possession* of property levied on by them in the course of their official duty. *Raiford vs. Hyde*..... 93
2. *Certiorari* from the decision of a County-Judge, must be sued out within ten days from the decision, and not afterwards, that being the time prescribed therefor in the act organizing the County-Courts. The decision of possessory warrants form no exception to this rule. *Robin vs. Nobles & Mitchell*..... 271
3. Upon the trial of a possessory warrant, the title to the property cannot be investigated; the Court must confine itself to the question of possession. *Jackson vs. Sparks* ..... 445
4. When A exchanged mules with B, and B sold the mule received from A to C, who was an innocent purchaser, A cannot, by a possessory warrant, recover the possession of the mule from C by showing that B had swapped to A a stolen mule for the one in controversy. *Ibid.*
5. To entitle a party to recover the possession of personal property by possessory warrant, he must show that the property had previously been in his possession. *Cobb vs. Megrath & Patterson*..... 625

## PRACTICE.

1. By the Act of 7th March, 1866, copies of lost bonds or notes may be established without requiring indemnity, unless the party liable for the payment of such lost paper, shall make oath, as required by the second section of said Act; which being done, the parties seeking to establish the copy bond, or note, shall be remitted to the remedies provided by law, before the passage of the Act of 1866. *Mayor, etc., of Savannah vs. Burroughs*..... 212  
*Mayor, etc., of Savannah vs. Cohen, Adm'r.,* ..... 219
2. When at a regular term of the Superior Court, held in the month of May, the Court not being able to get through with the business on the dockets, adjourned the Court over to the third Monday in August thereafter, in due form of law: *Held*, that parties and their attorneys having business in that Court, were bound, at their peril, to take notice of the meeting and adjournments thereof, and that this Court will not control the discretion of the Court below in refusing to reinstate a case dismissed for want of prosecution at the adjourned term of the Court, upon the statement of the plaintiff's attorney that he had no knowledge of such adjourned term of the Court. *Rawson vs. Powell*..... 255
3. New parties may be added to an original bill by an amendment in the nature of a supplemental bill; and the representatives of deceased persons may be made parties by *scire facias*. *Davis, Adm'r, et al. vs. Singleton & Black*..... 330
4. In a creditor's bill, others, not parties, may come in after decree, submit to the jurisdiction of the Court, and have their rights passed upon, and participate in a fund to which they may be entitled, according to the principles of equity. *Martin & Yates vs. Tidwell & Favor* ..... 332
5. Upon a petition to establish a copy of a lost promissory note, and issue joined as to the making of the note, the parties are entitled to a trial by a petit jury, with a right to appeal to a special jury. *Rutland vs. Hathorn*. 380
6. This right may be waived by consent, and the case submitted, in the first instance, to a special jury. *Ibid.*
7. If the case be submitted to a special jury, the parties have no right of appeal. *Ibid.*

8. A substantial compliance with section 3967 of the Code, requiring written notice of the sanction of a writ of *certiorari*, and the time and place of hearing is sufficient. *Milan vs. Sproull*..... 393
9. The object of giving the notice is to enable the party notified to take steps necessary to his defence. *Ibid.*
10. *Ex parte* affidavits, taken subsequent to the granting of a *certiorari*, are inadmissible upon the hearing of the case before the Superior Court. *Ibid.*
11. Where several joint defendants are declared against, as "of said county," some being served, and *non est inventus* returned as to the others, and a plea in abatement is filed, alleging that some of those not served reside in other counties in this State, the plea will be overruled, and the case will proceed against those served; the Court, in its discretion, may delay the trial, and have the other parties served. *Sanders vs. Etcherson*..... 404
12. If suit be pending against two or more, and some of the defendants die, the action may proceed against the survivors. *Ibid.*
13. If a general verdict be rendered in a case where some of those named in the writ as defendants, are not served, and others are dead, and their representatives, not parties defendants, the intendment of the law is, that the finding is against those only who are parties to the issues tried by the jury. *Ibid.*
14. The attorney prosecuting a case may have no authority to use the name of a party as lessor of plaintiff in ejectment, the Court should not, for this cause, dismiss the action, unless it appears also, that the client has no authority to use the name. *Shanks vs. White*. 432
15. To authorize a plaintiff in ejectment to use the name of another, he must show some connection between his title, and that of the person in whose name he sues. *Ibid.*
16. A plaintiff in ejectment should be permitted to use the name of another when he makes it clearly appear to the Court that such use is necessary for the assertion of his rights. *Ibid.*
17. The name of a party may be used as lessor in ejectment upon proper indemnity being given, not only without, but against his consent, when it appears to



- the Court that such use is important to the rights of a party. *Ibid.*
18. When one party seeks to recover damages for a violation of a contract, the other party may show that plaintiff has not complied with his obligations under the contract, and in good conscience, is liable to defendant. *Williams vs. Waters*..... 454
19. In a proceeding to eject an intruder from the possession of land, under the 4000th section of the Revised Code, if the defendant fails *at once* to tender to the sheriff such an affidavit as is required thereby, he will be turned out; he will not be allowed to tender a *defective* affidavit, retain possession under that, and when it is decided against him, tender another affidavit in terms of the law, to protect his possession. *Hass & Gardner*..... 477
20. In a proceeding to foreclose a mortgage on real estate, under the provisions of the Code, the mortgagor cannot set up as a defence for himself, against the mortgagee, that the property so mortgaged was *trust* property, and that he had no right to mortgage it. The mortgagee has the right to foreclose his mortgage *as against him*, there being no other parties interested before the Court. *Boisclair vs. Jones*..... 499
21. When a *certiorari* is applied for under the provisions of the Code, which does not require the sanction of a Judge, a notice to the adverse party that a petition for a writ of *certiorari* has been *filed* in the clerk's office of the Superior Court, for the removal of a case from a Justice's Court to the Superior Court, will be sufficient. *Price vs. Munroe*..... 523
22. When the Solicitor General is appointed to see that the grounds of a divorce are legal, and sustained by proof, (under § 1730 Revised Code,) he may introduce evidence, and enter fully into the defence of the case. *Creamer vs. Creamer et al.*..... 618
23. If the attorney have a lien or claim by special contract, the Court, in case of *tort*, should not direct a verdict to be taken for the value of the attorney's services, but should send the case to the jury upon the merits, as between plaintiff and defendant; and if the verdict be found sufficiently large, the attorney can be paid thereby, otherwise not. Whether the defendant in such a case shall pay the fees of the attorney for the plaintiff, must depend upon the recovery by the

plaintiff in a trial upon the merits of the cause sued on. *Gray et al. vs. Lawson, usee, etc.*..... 629

### PRACTICE IN SUPREME COURT.

1. A *mandamus nisi* to a Judge of the Superior Court, will be refused when the parties to the suit, by their written agreement, for their mutual convenience, did not present a bill of exceptions for his certificate and signature, until six months after the adjournment of the Court at which the trial was had. *Engel vs. Speer.* 258
2. When a case is brought before the Supreme Court by a written agreement of the counsel of the parties, alleging that certain errors were committed in the Court below, without any certificate from the presiding Judge that the same is true and consistent with what transpired before him in the Court below, the case will be dismissed. *Kiser vs. The State.*..... 260
3. When a cause was tried before a *petit* jury, and a verdict rendered, one of the defendants, on the 13th day of April, 1866, presented his bill of exceptions to the presiding Judge, who signed and certified the same on that day; on the 17th day of the same month, before the bill of exceptions was filed in the clerk's office, the defendant entered an appeal from the verdict of said *petit* jury according to law, and on the 19th of said month filed his bill of exceptions in said clerk's office, whereby the cause was heard and decided in the Supreme Court upon said bill of exceptions, (the counsel of the defendant in error having knowledge that an appeal had been entered from the verdict in the Court below): *Held*, that this Court had no jurisdiction to hear and decide the cause upon said bill of exceptions, when the cause was pending in the Court below on the appeal, and that the Court erred in dismissing said appeal, the same having been legally entered. *Armstrong vs. Hand & Bagley.*..... 267
4. When the transcript of the record from the Court below is not sent up to this Court as required by the provisions of the Code, unless good and sufficient cause be shown for the delay, upon filing the proper certificate of the facts, the judgment of the Court below will be affirmed. *The Liverpool Cotton Co. vs. Wiseman.*... 519

PREScription. See *Ways.*

## PRESUMPTIONS.

1. No warrant of attorney being required by the laws of this State or the practice of its Courts, to entitle an attorney at law to appear for a party litigant, the strong presumption is that he was authorized. *Dobbins vs. Dupree*..... 108
2. Condonation is not so readily presumed against the wife as the husband. Knowledge of the guilt of the husband and forgiveness by the wife, are not legally to be presumed, but must be clearly and distinctly proved, in order to bar the action. *Odom vs. Odom*. 286
3. At common-law a judgment twenty years old is presumed to be paid. *The State of Tennessee vs. Virgin*. 388
4. The law presumes that every officer will perform all his official duties. *McRae vs. Adams*.. .... 442

## PRINCIPAL AND AGENT.

See *Equity Practice*, 1; *Evidence*, 3.

## PRIVATE PROPERTY FOR PUBLIC USE.

See *Ways*.

PROCHEIN AMI. See *Divorce*, 1.

## PROMISSORY NOTE.

1. Plaintiffs in error and others purchased from Craig a *fi. fa.* against the Lawrenceville Manufacturing Company, in which they were stockholders, and gave therefor their joint note. One of the makers of the note, by importuning Craig, procured the substitution of another promisor in his place. Suit was brought on the note, and the plea was *non est factum*, (by reason of the alteration). Equity will, under these circumstances, compel the withdrawal of that defence or the payment on the note of so much of the proceeds or money collected by defendants on the *fi. fa.* by the sale of said company's property, as will, together with what plaintiff (Craig) had otherwise collected, pay off the note. *Lowe et al. vs. Craig*..... 117
2. Where parties made an agreement by which one pays and the other receives a certain amount, which is entered as a credit on a promissory note, the note is extinguished *pro tanto*, and the remainder due upon the note stands unaffected by the entry of the credit.

The amount thus credited cannot be enlarged, in the absence of any agreement of the parties, so as to extinguish a greater nominal amount of the note than the amount named in the credit. *Mordecai vs. Stewart.* 126

3. On the trial of an action on a promissory note, given in consideration of Confederate notes, the Court charged the jury, "That in determining the equities in this case, you may consider the law read from the Code, (section 2723,) authorizing the holder of a note payable in specifics, on failure of payment, to recover the value of such articles at the time the note is due and payable, but you are not *bound* to do so": *Held*, that this charge is erroneous, being calculated to make the jury believe that the value of Confederate notes, at the time the note falls due, is the amount for which they should find. *Cherry vs. Walker.*..... 327
4. When a promissory note is offered in evidence, and it appears to have been altered in a material part thereof, it is incumbent on the plaintiff to explain such alteration. If a material alteration is made in a promissory note by a party claiming a benefit under it, with intent to defraud the maker or other parties to it, such alteration voids the whole contract, if they so insist; but if the alteration was unintentional or by mistake, or not made with intent to defraud, it will be enforced by the Court. In such cases, the evidence should be clear and satisfactory upon the point that the alteration of the note was made under such circumstances as will rebut all motive of any *fraudulent intention*; otherwise, the party making such material alteration should suffer the legal consequences resulting therefrom. *Wheat vs. Arnold.*..... 479
5. A promissory note given to suppress a prosecution for felony, is void. *Brown vs. Padgett.*..... 609

### QUI TAM ACTIONS.

See *Pleadings*, 4, 5, 6; *Retroactive Legislation*, 1.

### RAILROAD COMPANY.

1. If a railroad company allows a slave to go off on their cars without a ticket or permit from the master, overseer, or person controlling the slave, the company is liable to the owner for damages. It is so by our statute. *South-Western R. R. Co. vs. Pickett.*..... 85
2. However white in color such slave may be, that fact

- cannot be considered by courts as excusatory of the railroad company, or altering the owner's right to damages. *Ibid.*
3. If a railroad company carry off a slave without the written permission of the owner, overseer, or employer, though the slave be in company with a thief, who had stolen him, the company will be liable. *Brown vs. South-Western R. R. Co.*..... 377
  4. Where the owner reclaims his slave, carried off under such circumstances as above stated, the measure of damages is not only the hire of the slave for the time he was absent, with interest added, but in addition thereto such reasonable and necessary expenses as he may have incurred in reclaiming the slave. *Ibid.*
  5. The cause of action having occurred before the Code went into effect, the plaintiff is not entitled to double the damages sustained, as provided for by section 2982 of the Code. *Ibid.*

## RES GESTÆ.

1. The declarations of the wife, when in the act of leaving her husband's house, and taking certain articles of household furniture with her, made in the presence of his two sons and others, are admissible in evidence for the purpose of showing and explaining her conduct and motives at the time, although her husband was not present. *Odom vs. Odom*..... 286
2. Declarations made by a party in his own favor, to be admissible as part of the *res gestæ*, must be shown by proof to having accompanied the act, or to have been so nearly connected therewith in time, as to be free from all suspicions of after-thought. *Rutland vs. Hathorn*..... 380

## RETROACTIVE LEGISLATION, Etc.

1. No legal right having vested in the informer by the institution of suit in his own name, the act of the Legislature remitting the penalties incurred by manufacturing companies for failing to publish the names of their stockholders, is not violative of that clause of our State Constitution which prohibits the enactment of any law injuriously affecting any right of a citizen. *O'Kelly vs. The Athens Manufacturing Company*..... 51
2. The cause of action (in this case) have occurred before the Code went into effect, the plaintiff is not

entitled to double the damages sustained, as provided for by section 2982 of the Code. *Brown vs. The South-Western Railroad Company*..... 377

3. The Act of December 13th, 1862, "to prevent the spread of small-pox in this State," is not retroactive; and the State is not liable for expenses incurred prior to its passage, by the Inferior Court of a county, for the benefit of small-pox patients. *The State of Ga. vs. Bradford and Snow*..... 422

ROADS. See *Ways*.

SCALING OF CONTRACTS. See *Ordinance of 1865*.

SCI. FA. vs. BAIL.

1. The Court, on the trial of *scira facias* against the bail, cannot enquire whether the amount of the bond was onerous. *Newton & McCullough vs. Bailey*..... 180

SCI. FA. TO MAKE PARTIES.

1. New parties may be added to an original bill, by an amendment in the nature of a supplemental bill; and the representatives of deceased persons may be made parties by *scire facias*. *Davis, Adm'r, et al., vs. Singleton & Black*..... 330

SELF-DEFENCE.

See *Criminal Law*, 1, 2; *Jones vs. The State*, 428.

SERVICE—AFTER RETURN-TERM.

See *Practice*, 11.

SET-OFF.

1. One judgment may, upon motion, be set off against another, when such set-off is equitable. *Skrine vs. Simmons*..... 402
2. If the indebtedness of one be the foundation of the credit given to the other party, and which credit cannot be enforced at law, this may sustain a set-off in equity. *Moody vs. Ellerbie, Adm'r*..... 666

SETTLEMENT OF CAUSES BY PARTIES.

See *Fees*, 2.

SLAVES.

1. If a railroad company allows a slave to go off on their cars, without a ticket or permit from the master,

- overseer, or person controlling the slave, the company is liable to the owner for damages. It is so by our statute. *South-Western R. R. Co. vs. Pickett*..... 85
2. However white in color such slave may be, that fact cannot be considered by Courts as excusatory of the railroad company, or altering the owner's right to damages. *Ibid.*
  3. If a railroad company carry off a slave without the written permission of the owner, overseer, or employer, though the slave be in company with a thief who had stolen him, the company will be liable. *Brown vs. South-Western Railroad Company*..... 377
  4. Where the owner reclaims his slave, carried off under such circumstances as above stated, the measure of damages is not only the hire of the slave for the time he was absent, with interest added, but in addition thereto such reasonable and necessary expenses as he may have incurred in reclaiming the slave. *Ibid.*
  5. The causes of action in this case have occurred before the Code went into effect, the plaintiff is not entitled to double the damages sustained, as provided for by section 2982 of the Code. *Ibid.*
- See *Mortgages*, 1, 2, 3, 4, 5, and *Wills*, 1, 3.

#### SOLICITOR GENERAL. See *Fees*.

#### SPECIFIC PERFORMANCE.

1. Specific performance of a contract in writing and under seal, made for and in behalf of minors, by an adult friend, with a brother who has attained his majority, as to the terms upon which their father's property shall be divided, will be decreed against such adult brother. *Smith et al. vs. Smith*..... 184

#### STABBING. See *Criminal Law*, 1, 2.

#### STATUTES, CONSTRUCTION OF.

1. The Act of December 13th, 1862, "to prevent the spread of small-pox in this State," is not retroactive; and the State is not liable for expenses incurred prior to its passage by the Inferior Court of a county, for the benefit of small-pox patients. *The State of Ga. vs. Bradford and Snow*..... 422
2. The object of said Act was to prevent the spread of small-pox, not to pay the debts already contracted by counties for the benefit of small-pox patients. *Ibid.*

As to Statute allowing explanation of Confederate Contracts. See *Ordinance of 1865*.

As to Statute allowing parties sworn. See *Evidence*.

As to Statute of Limitations. See *Limitation of Actions*.  
See *Attachments*.

## TAXATION.

1. When a physician is licensed by the authority of the State to practice medicine, the city of Savannah cannot require him, under a penalty, to take out license before he can practice his profession in the city. *The Mayor, etc., of Savannah vs. Charlton*..... 460
2. The practice of his profession in the city, is the subject of *taxation* by the corporation, but not of a license. *Ibid*.

## TRESPASS, VI ET ARMIS.

1. Trespass *vi et armis* does not lie against the Surgeon of a military post, who makes a requisition of a commanding officer for a particular house, as in his opinion suitable for a hospital, it not appearing that the Surgeon participated personally, or rendered aid, or incited the forcible dispossession of the plaintiff (Warner not presiding.) *Walker dubitante. McIntyre vs. Green*..... 48
2. A person aggrieved by a levy on his property, he being a defendant in the attachment or execution, has his remedy by a claim or action of trespass against the officer. *Raiford vs. Hyde* ..... 93

## USURY.

1. When W. borrowed of S. \$500, and promised to pay six per cent. per month for the use thereof for a part of the time, and five per cent. per month for the balance of the time, which was paid, but not credited on the note, and afterwards sold out his entire property to a third party who obligated himself to pay S. the \$500, on a bill filed by a creditor of W. against S., and the third party who purchased W.'s entire property alleging that W. had left the State and was entirely *insolvent*, praying that the usurious interest paid by his insolvent debtor, W., to S., might be credited on the \$500 note, and that the purchaser of W.'s property might be restrained from paying the amount of the usurious interest over to S., and be decreed to pay the same to the creditor's demand: *Held*, that the creditor was entitled to have an account taken of the amount



of usury paid by W., the insolvent debtor, to S., and to have that amount applied in payment of his debt.  
*Pope vs. Solomons et al.*..... 541

### VERDICT.

1. After a verdict has been received and recorded and the jury dispersed, it cannot be amended in matter of substance, either by what the jurors say they intended to find, or otherwise. *Mullins vs. Christopher*..... 584  
 See *New Trial*.

### VESTED RIGHTS.

1. No legal right having vested in the informer by the institution of a suit in his own name, the Act of the Legislature remitting the penalties incurred by Manufacturing Companies for failing to publish the names of their stockholders, is not violative of that clause of our State Constitution which prohibits the enactment of any law injuriously affecting any right of a citizen.  
*O'Kelly vs. The Athens Manufacturing Company*.... 51

### WAIVER.

1. A *mandamus nisi* to a Judge of the Superior Court, will be refused when the parties to the suit by their written agreement, for their mutual convenience, did not present a bill of exceptions for his certificate and signature, until six months after the adjournment of the Court at which the trial was had. *Engel vs. Speer*.. 258
2. While the conduct of the juryman, Jones, was unbecoming; yet, as it was known to the counsel complaining before the verdict was rendered, it is no good cause for a new trial. *Martin & Yates vs. Tidwell & Favor*..... 332
3. Where a party consents to the violation of an injunction granted at his instance, and takes upon himself the management of the case, he cannot subsequently have the opposite party punished for such violation.  
*Howard vs. Durand*..... 346
4. Equity will enforce the rights of parties; and those who invoke its aid, should not by contract render nugatory its processes. *Ibid.*
5. This right (trial by a petit jury on petition to establish a copy of a lost promissory note,) may be waived by consent, and the case submitted, in the first instance, to a special jury. *Rutland vs. Hathorn*..... 380

6. If the case be submitted to a special jury, the parties have no right of appeal. *Ibid.*

## WARRANT OF ATTORNEY.

See *Attorneys*, 2, 3.

## WARRANTY.

1. No particular form of words is necessary to constitute a warranty. *Terhune vs. Dever* ..... 648
2. To make an affirmation at the time of sale, a warranty, it must appear to have been so intended, and not to have been a mere expression of opinion. An affirmation of the soundness of a horse made *bona fide* at the time of the sale, does not necessarily amount to a warranty; whether the words used amount to a warranty or not, is a question for the jury, under the rules of law applicable to the case. *Ibid.*
3. When a party warrants the soundness of a horse, he is liable on his warranty, if the horse be unsound, whether at the time the warranty was made he knew of the unsoundness or not. *Ibid.*

WASTE. See *Equity*, 2, 20.

## WAYS.

1. There being no evidence that the road in controversy had existed for seven years, the Inferior Court had no authority to declare it a public road without providing compensation to the land owners for the damages thereby sustained. *Milam vs. Sproull* ..... 393

## WIDOW.

1. The laws of Georgia allow a widow one year's support for herself and minor children out of the estate of her deceased husband. They do not contemplate that she shall live at the homestead and consume the provisions belonging to the estate, and have a year's support also allowed. *Wells vs. Wilder* ..... 194
2. Whenever the widow applies for an assignment of the year's support, she must be charged with the value of what she previously consumed. *Ibid.*
3. \* \* \* \* \* *Held*, the widow was entitled to inherit one-half of the estate, as heir-at-law of her deceased husband and children, notwithstanding her intermarriage with Bozenman before the property had

been reduced to possession by her, and that the marital rights of the husband did not attach to any part of the property under the provisions of the Act of 1866.

*Ralston vs. Thornton, Adm'r*..... 54

4. The approval by the Ordinary of the election of a widow to take an amount of money to be assigned to her absolutely in lieu of dower, should be obtained before commissioners are appointed to assign dower.

*Smith vs. Smith*..... 62

WIFE. See *Husband and Wife*.

## WILLS.

1. Whilst the recognition by the State of Georgia of the abolition of slavery in its borders, may have been destructive of legacies of that species of property, as also of the general testamentary scheme of a testator, such facts furnish no sufficient grounds of *caveat* to the probate of a will. *Newsom, Guardian vs. Tucker*..... 71

2. A married woman in this State, who as a midwife acquires money by her separate earnings, with the consent of her husband, and afterwards with his consent, purchases real estate, and takes the title thereto in her own name, may devise the same by will, as her separate estate, with or without his assent, and after her death the husband cannot invalidate such devise by a change of the title to the property in his own name, especially when his *express assent* was given to such devise at the time of the execution of the will. *Cavanaugh et al. vs. Ainchbacker*..... 50

3. A legatee propounding for probate a nuncupative will, which is *caveated* by their heirs-at-law, is a competent witness in favor of the validity of the will. *Brown et al. vs. Carroll*..... 56

As to ambiguity in wills, etc., see *Evidence*, 2.

WITNESSES—*Opinions of*, see *Evidence*, 1.

“ Parties as, see *Evidence*, 3, 20, 21, 22, 23.

YEAR'S SUPPORT. See *Widow*.





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